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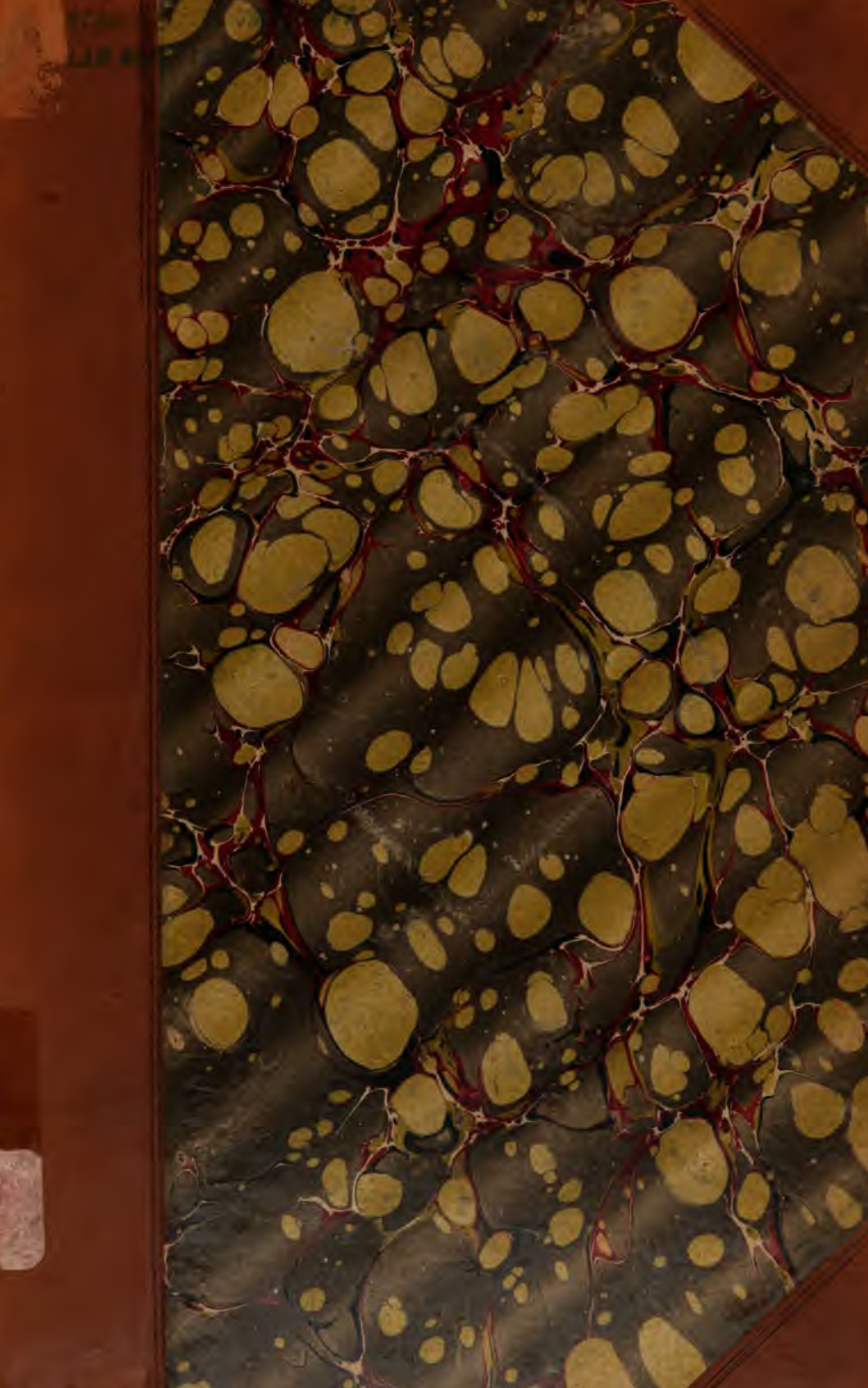

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THERE is a favourable concurrence of circumstances which will aid the consideration of all measures connected with the land and the law relating to it in the approaching session, and we shall not be surprised if they occupy a large portion of its time. Most of the great classes in this country are beginning to find out that a right understanding in this matter is of the utmost importance, and may afford a solution of some of the difficulties which press at this moment most heavily upon

particular interests, and more especially upon the Government. The owners of land are undoubtedly the class which has felt, and must long continue to feel most keenly, the effects of the legislation of the present Parliament, soon perhaps to be in its last Session, and it is in this quarter that measures of relief are most properly required. It would be no easy matter, even if it were otherwise proper or expedient, to reverse, or even to revise the policy of the last few years with respect to the land; but no one will surely complain if the landowner can be benefited without injury to any one else, nay, with advantage to many others besides himself. If the expiring Parliament of 1851 or 1852 can bequeath to the landowner, with its dying breath, such directions as to the use and management of his land as will convert it into a field of treasure, then will all rejoice. Nor do we doubt that the additional value which may be given to this species of property by judicious alterations of the law, will enable its owner to realise the sequel of the fable, in the words of the French translation, which happens to come most easily to hand: *Le champ, ainsi retourné, devint si fécond, que la vigne leur rapporta, pendant plusieurs années, le triple de ce qu'elle avoit accoutumée de produire.*

Be this as it may, there is one point on which, unfortunately, all are agreed — the deplorable state of the law of real property, its confused, contradictory, and self-defeating provisions. It is unnecessary to bring many proofs as to this. It is admitted equally by those who have the land and cannot make use of it, and those who have it not and yet want to get it. Consult the authorities we have placed at the head of this article, and you will find a greater concurrence of opinion on this point than perhaps on any other that can be named. Peers, Members of Parliament, merchants, farmers, landlords, tenants, tradesmen, labourers, working men, barristers, attornies, the most learned, the most ignorant, all agree in this, that the law obstructs and thwarts their wishes, prevents their obtaining their lawful ends, deprives them of their real power over their property, lessens its value, and sometimes renders it of no value at all, perplexes and harasses the rich, tortures and ruins the poor. This branch of our law is, fortunately, at

last fairly given up as a point no longer tenable, even by the most inveterate lover of abuses because they are old: so far the victory is complete.

Much evidence on the present state of our law of real property, and its want of adaptability to the present requirements of society, may be found in the Appendix to the Report on the Savings of the Middle and Working Classes. As this is, however, a conceded point, we shall prefer giving one or two questions and answers respecting the general wish to obtain land shown both by rich and poor.

"288. *Mr. Slaney:* You are, no doubt, cognisant of the fact, that in this country of great commercial enterprise, and of successful commercial enterprise, the usual custom of great bankers, of great manufacturers, and others, who have, by a long life of industry and enterprise, accumulated large capital, is usually to invest it in land? — *Mr. Stewart* (barrister): I believe there is almost always a wish, after a certain period of saving, to invest a certain portion of that saving in land. There is a sort of natural wish to buy land in almost all classes, and it is only restrained where the law is in so barbarous and uncertain a state, as positively precludes persons from doing it."

"413. *Mr. Ellis:* Is it not your opinion that the present state of the law tends to prevent the working classes from saving their money, because they have no proper way of investing it? — *Mr. Bowley* (a working man): Yes, no doubt; my experience of them is that they have a very great disposition to get possession of land and houses. Near me there is a locality occupied by working men upon leases; only leasehold property under the corporation, and with, perhaps, only ten to fourteen years to run; and notwithstanding that, they have built scores of miserable cottages. My experience of the working men is, that they have a very great disposition to get possession of something that they can see and feel — real property. I believe that there are a number of working men who would save their money in that way, not in the ordinary savings' banks at all, if they could have the property before them which they could feel certain was becoming their own; and that it would be like an insurance-office, and compel them to become saving, like a man insuring his life, who would not save without it. He enters into a contract to rent his house at so much money, and he is given credit every year for all he pays over 5 per

cent.; and by that means his inducement every year becomes stronger to continue his payments and become possessed of his house, which he does after fourteen years."

"560. *Mr. J. Ellis:* Is it your opinion that the working classes are more particularly anxious to possess land than to invest their savings in any other way? — *Mr. Millbank* (a watchmaker): At public meetings which I have attended, when mention is made of the possession of land there is a great deal of enthusiasm immediately manifested. That is my guide; and I think the large contributions of the working classes to Mr. O'Connor's scheme show that there is great anxiety on their part to possess land."

We may add Mr. B. Ker's evidence as to the state of the law.

"680. Do not you think that the present state of the law of real property, both as to the complexity of title, the cost of investigation of title, the expense of conveyance, and the stamp duties, has the effect of interposing obstacles to the investment of small or even moderate sums in land? — *Mr. Ker* (barrister): I do.

"681. Do not the same difficulties apply to investments in securities upon land, namely, in mortgage? — Yes.

"682. In consequence of those difficulties which prevent the middle and humbler classes from investing in land or mortgages, does not it appear to you that it would be right to give them additional facilities in other respects? — I think it would be right to give every possible facility, and to make the law as clear as possible for the sale and mortgage of land."

But then, notwithstanding all this, are we one whit nearer a useful result? The question is put in a practical form by Mr. Sewell. He says properly, that we can no longer look upon landed property but with a view to its utility:—

> "The value of the thing
> Is as much money as 't will bring."

It can no longer be placed in a category distinct from other property:—

"It is no longer a political instrument, binding together the different members of the community. It is a mere object of utility;—that from which we are enabled to derive our daily food, our comforts and luxuries,—which ministers to our ease and en-

joyment; it is, in short, what we term it, *property*, and nothing more. Hence we measure its value by the mere rule of money. We have lost all perception of duties, responsibilities or sentiments connected with its possession. An estate is to us such or such an annual income, convertible into such or such a gross sum of money, —an article which may be sold or mortgaged, or let out to tenants. Regarding it in this light, we have no scruple in forcing it from the hands of its owner, by substituting pecuniary compensation. And this view has become so habitual, that it seems almost like affectation to endeavour to apply to it rules drawn from any higher or better principles. The law of primogeniture, and the rules of descent are retained, because they have been proved to be convenient. This is, however, merely accidental. Should an idea prevail to the contrary, they would immediately be swept away." (Pp. 8, 9.)

The character and nature of land must be altered; the associations connected with it must be changed. The law and practice respecting it must be adapted to the present wants of mankind; the well-being of the landowner, nay of the state, perhaps its very existence in its present well balanced position, depend on this.[1] What, then, is to be

[1] We find some sensible observations bearing on this point in one of the leading articles of the *Times* of September 5., which we gladly transfer to our pages: —

"The land thus looked upon as simply a valuable *capability*, requires, in order to be made useful, much skill, capital, and industry, and they who apply these to the land will receive their due reward in that shape which repays the exertions of other capitalists of skill — viz., in profits. But in these days of active competition, profit repays the capitalist only when he employs great skill and great industry in the application of his wealth. The large manufactories of the cotton and woollen spinners in Yorkshire and Lancashire may be taken as the types and models of the mode in which skill and industry ought to be employed. No power is lost, no time is thrown away, every act is performed with mathematical precision. The thing to be produced must be the result of the least possible expense, every calculation must be so nicely made, and the system of production so accurately apportioned, that the whole profit — the final result to the capitalist — that which he obtains after replacing all that he has expended, is often only a very small per-centage upon each transaction, rapidity of operations making up for the smallness of the return. Now, capital employed upon land cannot, because so employed, be freed from the obligations of skill, care, accuracy, and constancy which attach to it in every other employment. Agriculture, in short, must be brought under the same rules which govern the other

done? We quote again from Mr. Sewell, because we most willingly select words agreeable to our own views from the mouth of a respectable solicitor; a class, by some supposed hostile to alterations in the law of real property.

"Now," says this gentleman, "however we may regard this view of the case,—though we may dislike or disapprove of it,—even though we may desire, as a matter of abstract theory, a recurrence to something better, yet it lies before us as a fact, which practical men must grapple with. It is as impossible to overlook it as any other material thing lying across our path, which hinders our movement;—we must submit to and accommodate ourselves to the external circumstances.

"If real property has thus degenerated into a mere thing of utility, legislators must frame their system of law upon corresponding principles. Indeed, the principles themselves have already

manufacturing processes. Agriculture must become a manufacture, and a farm be governed very much as a mill now is. The practical result from which there is now no escape is, that capital employed on the land, to be profitable, must be applied in large masses; and the persons who so apply it can no longer be a sort of upper farm labourers. The farmer, in short, must be a highly-educated man of business, wielding a large power, employing many skilful labourers, and using, in the business of production, all the appliances which a constantly improving science discovers. His mind must be open to receive every new discovery. He must not, with the blind presumption of ignorance, turn away from that which is new because it is new, nor be content to tread in a beaten path because his fathers trod there before him. Agriculture, in fact, will hereafter require men possessed of intelligence, of an order superior to even that of the mere manufacturer. The imperfect condition of the science prevents the possibility of making it a matter of mere routine. Much judgment, nicety of perception, and capacity in divining the probable consequences of new processes, will be needed to make a successful farmer; and exactly in proportion to the appreciation of this great novel necessity, will be the change in the class of persons who will make agriculture a business. This change has already begun; and we shall every day behold a larger number of instructed men of capital directing their energy and wealth to this new mode of employment.

"The present season being, as we believe, the fair starting point of the new system, will exhibit the change, indeed, in its least favourable aspect. The transition is yet far from complete; the beneficial effects of the new measure, through the operations of trade, are only beginning; and the condition of the landowner may now be looked upon as at its worst, and that of the agricultural capitalist as most beset with difficulty. Still, we are sanguine as regards the future destiny of each class, if they frankly accept the necessary consequences of their new condition, and act with the forbearance, intelligence, and energy which are now needed in every business by those who expect success."

become rooted and embedded in the system; it is but the forms which require change.

"It will be objected to any sweeping alteration, that it will be dangerous, because it will be new. This is no doubt a good reason for proceeding carefully, and well maturing our plans: — and change is in itself an evil. It is wisdom to bear with inconveniences as long as they are tolerable. But then this becomes a question of time and degree. No man hesitates to change his position or plans in life, when he sees ruin before him by persisting as he is. It is for prudence to determine when and under what circumstances an occasion for a change has arisen; but when the duty or necessity is manifest, promptness and decision are but parts of the office of prudence.

"This seems to me the only real question in the present case — Are the evils of our present law of such an extent or character as to justify a great change? The general opinion of society will answer the question unhesitatingly in the affirmative. The voice of lawyers themselves is to the contrary. 'Stare super antiquas vias' is their maxim and motto. Custom and precedent stand to them in the place of law. They will deprecate all rash and presumptuous handling of a system which, with all its faults, is somehow or another made to answer its purpose.

"Between the two contending parties who shall determine? It seems to me that something may be done towards reconciling the difficulty, if each party were made to understand something more of the other's case:—If landowners could make themselves conversant in a general way with the principles which regulate the enure and transmission of their estates, and if lawyers could be made more sensitive to the real practical grievances under which the community actually labours." (Pp. 9, 10.)

This is, we believe, all that is wanted. Lawyers must be prepared to give up many of the ideas now almost inseparably connected with land. On the other hand, it would be well if landowners and men of property were to look a little into the subject for themselves. Mr. Sewell has, further on, some sensible observations as to this. Addressing Lord Yarborough, Mr. Sewell says: —

"I suppose your lordship to have become the purchaser of an estate. You place the affair in the hands of your solicitor, and there you are compelled to leave it. Whatever questions or difficulties may arise, your lordship will be unable to facilitate their

removal. You will be as little able to judge upon the value of an objection to the title, or the risk incurred in dispensing with its removal, as you would be to prescribe for yourself in some dangerous disease.

"This seems to me to be a great evil. Not that I think it desirable that gentlemen should practise law upon themselves any more than it is safe for them to meddle too much with the science of medicine. Yet we do in fact keep family medicine chests in our houses; and we sometimes venture to administer harmless doses without recourse to a physician upon every slight ailment. Exigencies arise where this knowledge is of incalculable value. It is idle to object to this the common proverb, about the danger of a little learning. A little learning, coupled as it sometimes is with much presumption, is indeed dangerous, but the danger lies in the latter quality, not in the former. I cannot think there is danger in gentlemen being acquainted generally with the nature of the tenure by which they hold their estates, and of the transactions in which they may be concerned. But to the multitude the law is a sealed book." (Pp. 16, 17.)

But this is a digression. Let us proceed to our question what is to be done as to the law of real property and the practice of conveyancing. A great change in this direction is the wisest, the safest remedy, the remedy absolutely necessary. It is, moreover, inevitable in one form or other. And what is that change to be? Our readers are aware that the present Registration and Conveyancing Commissioners have presented their Report on the subject of Registration, and of the plan which they recommend we have recently given some account.[1] We presume there is no reason to doubt that this plan will be embodied in a bill in the next session of Parliament.[2] While this Report was pending we thought it right to endeavour to guide public and professional opinion into a direction somewhat different from that to

[1] 12 L. R. 405.

[2] It is to be observed that this plan is already in force so far as *Ireland* is concerned. See 13 & 14 Vict. c. 72: "An Act to amend the Laws for the Registration of Assurances of Land in Ireland." It will be remembered that there is already a map of the whole of Ireland on the scale of six inches to a mile, prepared under the authority of the Ordnance. This has long been used for Conveyancing purposes with advantage. See Evidence of Mr. Pierce Mahony, 1st Reg. Com. Report. qn. 36, 37.

which the Commissioners have arrived. But we have great confidence as well in their zeal as in their learning; and knowing some of the difficulties under which they were placed, we think it right to withdraw our own opinion, and to give in our full adherence to the plan they have proposed. We do this on full reflection, and recommend its adoption by others, as the only course likely to render the great object of a Register successful; without which no effectual change in the law of real property can take place. Besides, it is to be remembered that the Commissioners in proposing their plan observe, that "it will give facilities for the introduction of all the improvements of which the law of real property may be found susceptible," (p. 36.); and they say further, as "under this plan all the rights affecting any given portion of land may ultimately be ascertained from the register, its adoption would lessen the danger to which existing interests might be exposed from the introduction of Judicial Registration (or of some system having a like result), if it should be thought hereafter advisable to facilitate transfers by such an expedient." (P. 37.)

Under all these circumstances, we have no hesitation in saying that the first of the measures connected with land which we hope to see proposed in the next session, will be,

I. A GENERAL REGISTER OF DEEDS FOUNDED ON A MAP AS PROPOSED BY THE REGISTRATION AND CONVEYANCING COMMISSIONERS.

We should, however, be very much concealing the truth if we thought that either the public or the profession would or ought to be satisfied with this even as a preliminary measure. Indeed, we are certain that the greatest disappointment will be felt if some speedy step is not taken for the benefit of existing holders of land. It is obvious that the benefits of the Registration Plan are almost entirely prospective; nay, it is possible that it may occasion the present holders, or some of them, some trouble, vexation, expense, or even worse injury. It is not imagined by any one that if this plan were to come into operation on the 1st of January next, it would relieve the

transfer of land immediately from any portion of its present difficulties. It would, for many years, if nothing else were effected, be as costly, as dilatory, as vexatious as ever. This measure we believe will now pass, Sir John Romilly leading the lawyers on the one side, and Mr. Henry Drummond heading the squires on the other. But it would be a delusion to count this, so far as the present holders of land are concerned, as any thing but a victory over prejudice and interested opposition. For future owners of land it will do much; for present owners but little: they will soon find that they are at best left where they were. In all other quarters the healing streams of law-amendment are flowing forth, soothing and fertilising, and the present generation are drinking the waters, but to the landowner, who most needs relief, none as such is extended. If we mistake not, he is, at this moment, not quite in the temper to sympathise only with the woes of others, and not to feel that he has the best right to remedial measures, and to look to Government for them. We trust, then, we shall not be thought unreasonable if we venture, on behalf of the public and the profession, to demand some measure which will operate as a real relief; which will set free the transfer of land from its present costly, vexatious, dilatory, and dangerous procedure; which will shorten the investigation into titles, and render dealings in land safe, cheap, and practicable; which will bring this coveted commodity of land within the reach of all classes, and extend to it the benefit of the rules which govern all other articles of commerce. We should not make this proposition if we did not believe that the means of obtaining these desirable objects were within our reach; and we shall at once lay the outline of the plan that we propose before our readers, observing, that perhaps it has been already indicated to them, but not so distinctly or with so much authority as it appears to us now to be supported.

It has been frequently remarked, that if the same view of any subject strikes several persons about the same time, who have no communication with each other, it is very likely to be a true view. Thus it is, that most scientific discoveries have usually various claimants in different parts of the world,

or perhaps of the same country; the truth being, that where minds are nearly equally advanced in any pursuit, they will often arrive at the same conclusion without any communication with each other. Now we shall proceed to show that at least three gentlemen who have all given attention to the subject, have very recently proposed plans nearly similar, which, striking at the root of the present practice of conveyancing, would go very far to relieve the future transfer of land from the preliminary investigation of titles, which is admitted to be the great source of expense and delay now affecting the transfer of land.

The first is that proposed by Mr. James Stewart, which we shall give first, because it was brought before the Registration Commissioners in 1847, and is printed by them in the Appendix to their Report, and appears to be the plan alluded to as that on which they have given no distinct opinion, as not being within the terms of their Commission,—a subject to which we have already alluded.[1]

Plan I. (*Mr. Stewart's.*)

"The retrospective deduction of title appears to me to be the great practical grievance of the present law of real property. The only object to be attained by the investigation of the title is the safety of the purchaser, but the present practice as to examining titles may otfen render the title unsafe. Added to this, the strict practice as to retrospective deduction of title, if adhered to, would render the sale of small pieces of land almost impossible except under peculiar circumstances.

"Examination is therefore entirely omitted, or it is evaded by conditions of sale, or special Acts of Parliament are passed which exempt property from its operation.

"The whole practice as to title is the great evil to which, if possible, a remedy is to be applied. It is desirable to obtain:—

"1. An easy and cheap mode of transfer of and dealing with land.

"2. Security of title.

"3. Certainty as to time in dealing with land.

"These are not afforded by the existing law.

[1] 12 L. R. 423.

"The plan of registry proposed in the Second Real Property Report, although it would be attended with much benefit, would not ensure these advantages.

"But I believe that a registry might be established by which they might in time be obtained.

"The first step towards the formation of a registry, on the plan proposed, would be the completion of a general map or survey of the country.

"But much might be done before this was completed: a register of titles relating to real property should be immediately established, extending, by means of districts, throughout the country.

"The registrars should be persons acquainted with the law of real property.

"The mode of proceeding, in the first instance, would be as follows:—a person desirous of selling or mortgaging his estate should be enabled to come to the registrar with his deeds, who would at his request examine his title.

"This might be done either by the registrar himself, or by a certain number of conveyancers appointed for the purpose, as might be thought best.

"If the title was approved of, the consent of the registrar should vest the whole legal and equitable estate in the purchaser or mortgagee, giving a good title against all the world except claims appearing on the register.

"The instrument of transfer would be in one settled and concise form.

"If any defect appeared on the title, a part of the purchase or mortgage money should be retained by the registrar for a certain time.

"In all cases, a small sum by way of premium should be paid out of the purchase money, to form a fund out of which persons should be indemnified for losses occasioned by improper transfers.

"It would be desirable that a map on the proper scale should accompany every transaction of this nature, until the map of the parish in which the lands were situated was completed.

"After the transaction was thus completed, the deeds relating to the property should be delivered up, and the registry would commence as to the property so dealt with, and all the transactions relating to it would in future appear on the registry.

"As soon as the map of the parish or district in which the property so dealt with was completed, the following particulars would appear in the registrar's book, viz.:—

"1. The parish and district.

"2. The numbers on the map distinguishing the lands dealt with.

"3. A description of the lands, with their acreage.

"4. The name of the person or persons having the legal estate.

"To which might be added the estimated value of the lands as shown by the poor's rate, &c. The charges and incumbrances would also appear on the register.

"After the map of any parish was completed, the dealing with the land in it would be greatly facilitated.

"It would also be convenient to have separate entries of mortgages, settlements, and leases. The office should give certificates to the legal owners of these various dealings.

"The giving this absolute power of disposal over the land is supported to a great extent by other similar powers, now given either by the rules of law or by the practice of conveyancing, in other kinds of property; as in

"Personal chattels;

"Stock in the Funds;

"Railway and other shares;

"Leaseholds, when vested in trustees whose receipts are sufficient discharges.

"It was also the rule of law as to all freeholds, to a certain extent, until a very recent period.

"In order, however, to prevent improper dealings, a system similar to that of distringas over stock in the funds should be joined to the system of transfer.

"The indemnification of persons entitled to the land by money is supported by the practice under Railway Acts, and by the bill now before Parliament for dealing with incumbered estates in Ireland [now the Incumbered Estate Act].

"In this case, as in those, a great national object is to be obtained.

"By this plan it appears to me that, without any compulsion or alarm as to investigation of titles, the whole of the lands in England would gradually come on the register.

"I have not thought it necessary to point out in what way the expense of the registry is to be defrayed, or the existing machinery which might be rendered available for its service.

"It would further be advisable, in connexion with this subject, to relieve real property from the lien of judgments; but to place freehold lands in this respect on the footing of leaseholds.

"There should also be a revision of the Stamp Laws."

Our readers, if they refer to the examination of Mr. Stewart as to this plan by the Commissioners, may see the difficulties with respect to it very properly and acutely stated; but we may say they have not altered our opinion as to its being advisable to entertain a plan of this nature. In this opinion we are confirmed by the proposal of the two other Plans which we are now about to lay before our readers; as these, it will be seen, are in many respects similar to Plan I. The first is that proposed by Mr. Sewell, which we shall call

Plan II. (*Mr. Sewell's.*)[1]

"The first step in a general registry of titles must of course be to obtain perfect surveys or maps of the whole property of the kingdom. Nor will this be difficult. By far the greater part is already complete. The tithe commutation maps include all the titheable parts. A very little filling up, enlargement, and correction would make them serviceable for a wider purpose. The expenses already incurred about them will in this manner be turned to very useful account." (P. 87.)

"In this manner let me suppose that we have obtained a perfect and accurate delineation of the whole surface of the kingdom. All the rights of real property must exist over or in respect of the soil, which this surface represents.

"Very simple and intelligible symbols of reference, as letters of the alphabet and numbers, would adapt these maps to books of registry.

"Having established this visible connexion between the *soil* represented by the survey, and the *title* to it to be recorded in the register, the mode in which that registration may be carried into operation would admit of various arrangements.

"Undoubtedly the most convenient form would be a table, which should exhibit in one view the different interests existing in respect of each parcel of land, and showing synoptically the proper relationships of those interests to each other. I believe this to be quite practicable, though its practicability would not be essential to the principle of such a registry itself. Something would be required, it is true, to reduce into order and within reasonable rules some of those irregular and eccentric rights, which I have shown your

[1] It is proper to state that this plan was laid before the public in the first edition of Mr. Sewell's pamphlet, published, we think, in 1846.

lordship to be the source of so much practical inconvenience. But this would naturally follow a classification framed upon sound principles.

"The *formulæ* of expressions now in use, such as the terms *estates in fee simple, in tail, for years, or for life*, carry with them known meanings, and require little or no addition to adapt them to each particular case. If it be asked how I reconcile this with the present sometimes enormous length of deeds, I answer, that deeds do sometimes swell to a great size, yet their essential and operative parts are capable of being compressed within a short compass, and the effect of a registry would, of itself, be to supersede the greater part even of this. (Pp. 89, 90.)

"A registry of titles would of course be ineffective without in some measure disclosing these dealings with property. It is a question of debate how far they ought to be fully described, so as to be made notorious, in order, it is said, to prevent fictitious credit. There may be a difference of opinion on this point. As far as I can judge, the general prejudice is in favour of secrecy; and I think any scheme of registration which should endeavour to establish an opposite practice would not meet with success. With this view, it seems to me very practicable to make a public registry simply describe by a single entry, as by the term *caveat*, the fact of hypothecation, leaving the terms and particulars of each hypothecation to be described by its own distinct instrument, fitted to the registry by some symbol of reference, and preserved either separately and secretly on files, or in some other simple way. This plan would answer the purpose of placing *a visible legal check* on the alienation of the property incumbered, and yet without such a disclosure of private transactions as would be objectionable even to the most fastidious owner of an estate. Compare the indistinctness of such a notice with the exposure of private affairs constantly happening through the offices of solicitors, conveyancers, stationers and other persons through whose hands private deeds now pass." (Pp. 96, 97.)

"The most convenient divisions of such a registry would be into local districts, about large enough each to occupy the time of a single registering judge. The circuit of such districts would vary—probably on an average each county would require three or four subdivisions. If any benefit were expected from a central or metropolitan registry, it might be secured through a duplicate registration in London, which would be a mere mechanical transcript of that in the country. I do not, however, see any sufficient object in this. Local situation is the real guide in all ordinary

affairs respecting real property; and I see no reason why they should not be transacted actually on or near the spot. Such a method is surely as likely to suit general convenience as the present practice, according to which the place for the final settlement of these matters depends on the accidental place of custody of title deeds.

"But is it possible to make a registry of this nature available as a means for giving effect to the various modes by which property may be obtained, as by purchase, prescription, succession, descent, or devise?

"A registry of the nature I have described would require the direction of a really efficient responsible officer conversant in the law of real property. Many such are to be found at the bar amongst practising conveyancers,—men who would be as well or better qualified to pronounce judicially upon points of real property law even than the highest equity judge. Men of this class must of course be tempted from a lucrative profession by corresponding remuneration; but the superior ease, dignity, and certainty of income attending a judicial office would make up for some loss of income.

"A registering officer presiding over such a district court would be virtually a judge in the first instance in matters of real property. His operations upon the registry would be judicial acts, and would have, if unappealed against and unreversed, the effect of law. In cases of doubt or dispute, a very simple machinery might provide a remedy for enabling parties thinking themselves aggrieved to appeal.

"And is not the establishment of such a judicial officer agreeable to the evident wants of society? Is not this indicated by that constant recurrence to counsel which I have mentioned, as the ordinary practice in conveyancing? What is this but an attempt to reach, in an imperfect and extra-judicial manner, a formal sentence upon the validity of titles, upon which men may practically act? Such a practice may be regarded as a sign indicating the remedy required. If the state of the law is such as to require these *responsa prudentum* before men can venture to complete purchases or mortgages, it seems to me incumbent on the legislature to provide them in a formal authoritative shape—for the poor as well as the rich—in small affairs as well as large ones.

"Nor would the expense be an objection, as the salary of a judge of this kind would but represent the income now paid to him in one way or another by the public in the shape of casual

fees. Indeed, in point of expense, the public would, upon the whole, unquestionably be prodigious gainers by such an arrangement.

"I am not insensible to the difficulties and objections to such a measure; but the question lies between a choice of evils. Either we must remain as we are, merely applying minor remedies, which will produce no substantial improvement;—or we must try the effect of a registration of deeds, of the inefficacy of which I think we have already sufficient experience, and against which, as involving in its very principle of indiscriminate notice too much exposure of private affairs, I think there would be an insurmountable prejudice;—or (which seems to be the only remaining alternative) we must adopt a registry which shall have a judicial operation.

"To the latter plan it may be objected that it would be opposed to all established principles; but I think this is not so. The title to 800 millions of property in the funds is trusted to a mere inscription in the Bank books, and its changes of ownership are effected through the simple agency of Bank clerks. The title to real property would, it is true, be more complicated, and would require a higher description of machinery and superior heads, but the principle would not be different. Let me ask, whether the power of transferring real property with as much ease as money in the funds would not be a great addition to its value? We know that one of the real causes of the high value of the funds, is the facility with which parties can deal with it. The same result would no doubt be obtained by a similar practice as regards real property.

"Again—can it be objected that a judicial power of this kind is foreign and unsuited to us? Consider that all the *personal property* of the kingdom—involving with it, through leasehold interests, and the equitable doctrine of trusts, a vast mass of landed property—is already under the absolute control of the Ecclesiastical Courts. The grant of probate or administration by these courts—many of them of a low and inferior kind—operates instantly to confer a title to the whole personal estate of a testator. Can there be any thing more summary in the power to be conferred on a judicial registrar of real property? With these instances directly in point, I will venture to assume that such an objection cannot be maintained." (Pp. 99—101.)

Mr. Sewell then states how a plan of this nature is to come into operation:—

"But how shall we adapt such a system to the present state of things, so as to bring it into operation? We cannot, I think, attempt any forcible or violent alteration. We cannot have an itinerant commission ransacking the deed chests of each landowner, in order to extract the true state of the title to his property. This would not be tolerated. But I think we may attain the end without recourse to any such extreme measures. Establish a registry upon the principles I have suggested, and offer it to purchasers and mortgagees.—We may be very sure they will readily adopt it. They will require before accepting a title that it shall have undergone the scrutiny necessary to establish its validity. This scrutiny would stand in the place of the present investigation by counsel. It would be carried on by the registering officer, whose labours would at first be thus comparatively heavy, but would gradually become lighter as the registry came into full operation. A vendor or mortgagor would thus be required, before he could complete a sale or mortgage, to have his title recorded on the registry. The registering officer would through himself and his clerks pursue the same process of investigation which a purchaser's or mortgagee's solicitor now does. The title deeds would be examined, and their substance and effect reduced within the form of the registry. The deeds would then probably remain in the custody of the registrar, subject to any provisions which might be considered proper for making them accessible by proper parties.

"Supposing by the operation of such a registration the rights of any parties should be excluded, proper remedies might be reserved to the parties so excluded as against the party who properly would be answerable to them for compensation, though as against the purchaser or mortgagee who would have purchased and obtained a legal title without notice of the supposed excluded rights, all remedy would be at an end. In this respect registration would have the same effect as a conveyance of the legal estate to a purchaser or mortgagee without notice now has against parties having latent equitable interests.

"There seems to me nothing impracticable in all this. In the course of years, the natural progress of things and the changes which property continually undergoes, would bring within the operation of the registry the whole, or at least the greater part, of the property of the kingdom." (Pp. 104—106.)

Now this is the remedy proposed by a respectable solicitor, who shows himself at once a good real property lawyer and a practical man. We shall add the Plan of Mr. Frend, the

conveyancing counsel, which has been more recently laid before the public, but which will be found in many respects similar to the two former plans. Mr. Frend agrees with the preceding gentlemen that "it is the preparation of the abstract and the verification of the title which principally advances the cost of selling or mortgaging land." (P. 6.)

We shall first give Mr. Frend's general opinion as to a register and its advantages, with which we agree:—

"To be effectual, a general register should import notice to all the world, and none but registered documents should avail against purchasers or mortgagees; with these concomitants, a general register would be of the greatest value to the community, both as affording direct and immediate security to purchasers, and as supplying the source whence to derive the knowledge of the true history or state of the title; but the diminution in the expenses of selling or mortgaging would be comparatively inconsiderable, simply because the mere fact of a deed, or the memorial of a deed, appearing on the register would not by any means preclude the necessity of inspecting and verifying the vendor's or mortgagor's title during the usual period of sixty years. The register, would no doubt, be conclusive as to the existence and number of the documents affecting the title; but their legal effect and operation would still have to be judged of or considered by the purchaser's advisers, and births, heirships, marriages, and other extrinsic facts must be proved as now; and for these purposes an abstract of the title would, as at present, have to be furnished and supported by the customary evidence.

"Without, therefore, denying the value of the principle of general and compulsory registration within its proper province, and whether it be carried into practice by means of what I have called a transfer register, or by a general register in the ordinary sense of the term; but on the contrary, strongly advocating the establishment with all convenient despatch of a register of the latter description (subject only to the qualification that the offices of registration be not centralized in the Metropolis, but localized in and diffused over the several counties or other convenient districts); I confess that it appears to me, that neither registration, shortened conveyances, nor reduced stamp duties will, either alone or together, effect the desired result of lessening materially the expenses attendant upon the sale or mortgage of landed property." (Pp. 12, 13.)

He then proposes a scheme which, in his opinion, would effect the necessary alteration. This we shall call

PLAN III. (*Mr. Frend's.*)

"I now venture to propose the outline of a scheme, which has occurred to me, of insuring the stability or certainty, or perhaps more correctly of evidencing the state of titles to real estate, by means of certificates, to be obtained from a Board or Court of Commissioners to be for that purpose created by Act of Parliament. My proposal cannot be considered as throwing any obstacle in the way of more extended reforms, nor, especially, of being inconsistent with the establishment of a General Register, with the existence of which it is perfectly compatible: indeed, a register would be a very desirable, though not an absolutely essential adjunct to the operations of the proposed Commission.

"Having thus premised, I proceed at once to state that the fundamental or leading features of the plan of certification which I contemplate are as follow;—viz., I propose,

"I. That there shall be constituted, by Act of Parliament, a Board or Court of paid Commissioners, sworn to secrecy, whose duty it shall be to examine into such titles to landed estates as are voluntarily brought under their official inspection.

"II. That the Commissioners shall, on the completion by them of the examination of each title submitted to their notice, grant a sealed certificate, descriptive of the precise state of all the then existing estates, rights, and interests, both legal and equitable, in the land; for which purpose the applicant for the certificate will of course be required to produce the Commissioners a complete abstract of the title, and to verify it as well by the production of the originals of the abstracted documents, as by proof satisfactory to the Commissioners, of the occurrence of such deaths, marriages, births, heirships, and other extraneous matters, as are essential to be proved in verification of the title disclosed.[1]

[1] "It will be observed, from this and the following fourth and sixth heads of the proposal, that the insertion in certificates of an express saving of the rights of third parties, claiming under instruments *not* produced before the Commission, is not contemplated. It appears to me that, by requiring sufficient publicity to be given by advertisement of the intention to certify a title, previously

"III. That in order to aid the Commissioners to perform the functions of their office with a due regard to the *possible* interests of third parties, and at the same time to simplify, as far as may be, the contents of the official certificates, the Commissioners shall be invested with the power of submitting doubtful points of *construction* on written documents, in the form of cases for the opinion of the Judges, whose decision on the points submitted to them shall (after due notice for, and argument on behalf of the persons possibly interested under the doubtful document) be final.

"IV. That an official certificate shall not be issued until after the intention to grant the same shall have been sufficiently notified by advertisements, to be inserted in the *London Gazette*, and in one or more newspapers circulating in the immediate locality of the land, the title to which is to form the subject-matter of the certificate, — such advertisements not necessarily disclosing the intended contents of the certificate, but describing in general terms, the locality and boundaries of the estate, the title to which has been brought under the Commissioners' notice, and requiring or calling upon all claimants (if any), not parties to the application for the certificate, to come in before the Commission and produce and support their claims.

"V. That the Commission shall be invested with the power of directing issues to try the validity of disputed rights or claims, or, at the option of the applicant for the certificate, to grant the latter conditionally or in subjection to such disputed rights or claims.

"VI. That an official certificate shall, on its grant, be primâ facie evidence of the state of title thereby certified, and (by analogy to the old law of non-claim on fines) shall, after the lapse of five years, be final and conclusive evidence against all the world.

to the actual grant of the certificate, and by suspending the conclusive operation of the certificate for five years after its date, the rights of third parties will be amply guarded, while the value of the certificate would clearly be fearfully depreciated, were it to contain such an express saving of rights as above alluded to.

"Although not so mentioned in the text, it might be found requisite to append to each certificate a schedule, or for the Commissioners to preserve a list of the documents perused by them, *not*, of course, for the purpose of fixing purchasers or mortgagees with notice of, or the necessity of inspecting those documents, but merely of determining whether claims made during the suspensory period of five years, do or do not arise under instruments already adjudicated upon."

"VII. That the original of each certificate shall be preserved and registered, and an office copy thereof be evidence. And (but this is of more questionable expediency) that the register of certificates shall be open to public inspection, and constructive notice to all persons.

"VIII. That whenever certificates are granted, upon the application of tenants for life, or other partial owners having the lawful custody of the title deeds, (and the custody of, or control over, the deeds, it may be here remarked, would necessarily be a condition precedent to the application for a certificate), the costs of the application for, and the grant of the certificate shall, at the applicant's option, be charged on the land, and be made payable to Government, with interest, by yearly or other periodical instalments.

"IX. That the Commission shall be primarily paid out of the Consolidated Fund, but ultimately by the owners of estates, the titles to which are certified.

"X. That the Commission shall be empowered to grant either general and absolute or special certificates; thus, if any given applicant satisfactorily prove that he is absolutely seised in fee simple, the certificate would be absolute and unconditional, and simply certify the applicant's seisin in fee at some given date; but if, on the contrary, the question of whether the applicant is or is not seised of the fee depends upon an unproven fact, such as that of his elder brother having died childless, then the certificate would be special and conditional, and certify to the effect that the applicant is the absolute owner, *if* his brother died childless.

"XI. That the Commissioners shall have power to frame rules, (certified by them to, and approved of by the Lord Chancellor and one or more of the common law Judges), with regard to the nature of the evidence to be received and admitted of extrinsic facts, and relative to other matters necessary for the guidance of the Commission in their operations.

"XII., and lastly. That trustees for minors, and others under disability, shall (subject, of course, to proper checks) have the like power of applying for certificates as their *cestuis qui trustent* would have possessed if of legal capacity; the costs of the application in such cases being either charged on the land, or paid out of the general trust of the estate." (Pp. 13—18.)

It will be readily seen that all these Plans agree in their

principal features, viz., that in order to obviate the necessity of the reiterated investigation of title, an examination should be made once for all by an official authority, which should be ultimately conclusive upon all persons interested in the land, the title to which is so examined; but that such investigation should not be compulsory on any one, but should be offered to all persons dealing in land who choose to accept it. It will be seen also, that in the first Plan provisions for the Insurance of Titles are added, under which a fund is provided for giving indemnity against any oversights or blunders committed by the Examining Authorities; and this, in our humble opinion, would be a useful, though not a necessary, accompaniment to the Plan.

We do not hesitate, therefore, in requiring, as necessary for the landowner, and more especially for the present race of landowners,

II. The Establishment of some Government Authority for the Investigation of Titles in connection with a Registry.

If we wanted any proof that such a course was practicable, we might properly refer to the Irish Encumbered Estates Commission. To use the words of Mr. Frend, "there can be no doubt that an institution of this nature will work."

"With respect to its practicability, there can hardly, I think, be two opinions; for by the experiment which has been tried in Ireland, we know that it is quite possible for a Commission to *operate* effectually on titles.

"Whatever doubts may exist as to the *policy* of the Encumbered Estates Commission in that country, no one as yet has, as far as I know, hinted at the incompetency or inability of a Board of Commissioners to arrive at a correct knowledge of the state of titles to landed estates; it is on the assumption of the acquisition of this knowledge, that sales of estates under the Encumbered Estates Commission are effected; for though it is quite true, that the immediate result of a sale by the Irish Commissioners is simply to substitute a money fund for an estate in land, yet it is equally true, that to authorize the Commissioners to proceed to substitute money for land, they must be satisfied that the right of calling for the substitution resides in the party who requires the statutory power

of sale to be exercised. And as the right in question resides only in parties in some way or other interested in the land, it is perfectly obvious, that the Irish Commissioners must (and indeed every one knows that they do) practically adjudicate on the titles brought before them, and on the value of the evidence produced in support thereof.

"I take it for granted, therefore, that the adoption of some such plan as that which is the subject of my present proposal, is feasible and possible; and that it is not to be altogether shelved, on the notion of its being impracticable or purely visionary. Of the policy of the scheme serious doubts might be entertained, were the certification proposed a matter of compulsion; but being merely a voluntary process, to be undergone, or not, at the option of individual landowners, the question of policy is brought within very narrow limits; for it turns altogether upon the previous question, of whether or not it is expedient for the Government to incur the first outlay incidental to the creation of a Board of Commissioners, whose ultimate payment will depend upon the intrinsic value of a scheme, the success of which it is obviously impossible to predict with certainty until its merits have been fairly tested. If there appear to be a reasonable prospect of a general adoption, on the part of landed proprietors, of the benefits which the Commission would hold out to them, then, unquestionably, it would be worth the while of the Government to risk the possible loss consequent upon the establishment of the Commission; but if, on the other hand, it can be shown that the advantages of the Commission, when established, are simply speculative and visionary, and that the beneficial results to be derived from the operations of the Commissioners are so questionable as to render it seriously doubtful whether the exercise of their powers would be extensively put in requisition, then no doubt it would be impolitic to hazard the expense and consequent odium of constituting a Commission, the immediate and primary cost of which would fall on the country at large. The question of policy, however, is so intimately blended with that of the utility of the scheme, that the one can hardly be considered apart from the other. If the scheme be useful it is politic, and to be politic it must be useful." (Pp. 18—20.)

Certainly if the success of any such plan in England may be inferred from the success of the Antecedent Commission in Ireland, nothing can be more complete. Whether we look to the amount of property already brought before it,—the easy, expeditious, but satisfactory manner in which titles have

been investigated and sales effected, — the general amount of confidence which a tribunal so novel in its operation and so recent in its establishment has acquired, or the great benefit already obtained through its instrumentality, as well by individuals as the country at large, we shall find that the official returns relating to this subject are only less strong than the public voice. We hope to be able shortly to devote some space to the express examination of the documents which have already been laid before Parliament on this matter. Of these we wish at present to notice only one. It has been said by those who could cavil at nothing else[1], that however easy it was to effect a sale under the Commission, the difficulty would lie in the ready distribution of the proceeds of the sales; but let us give the short answer to this to be found in one of the returns of the Commissioners. Let it be remembered that the Commission has only been in existence about a year, and by this document it appears that the Commissioners have sold more than half-a-million's worth of property, and of that sum they hope to distribute the entire in their court with the exception of 25,000*l.*, which may be transferred to the Court of Chancery. About 100,000*l.* has been already distributed. The Commissioners hope, without any assistance from any other court, to distribute 200,000*l.* before

[1] We are far from placing Sir E. Sugden in this class, yet doubts occurred to the mind of this eminent and experienced person on this point. In his evidence before the Salaries Committee, he says, "What is passing in my mind is this: under the Encumbered Estates Act there are two operations which the Commission has to perform, one is, to sell the estates; the other is, to decide upon the rights of the parties produced by the estates. The selling of the estates is of course an act which does not involve any difficulties, but after the estates are sold the Act of Parliament enables the Commissioners, if they think right so to do, to send the case into the Court of Chancery for adjudication as to the rights of parties to the money. . . . . I am not aware that the Commissioners have yet addressed themselves to the duty of deciding upon any of those rights. The estate is sold, the money goes into Court, and all questions of conflicting rights are left to be decided. If they do not grapple with these questions as they arise, and decide who is entitled to the money produced by the sales of the estates, I think there will be great embarrassment." (Salaries Committee Ev. qn. 2131.) But we apprehend that it is the intention of the Commissioners to grapple with these questions and to decide them, and the return above alluded to shows that they have done so effectually. Heaven forbid that these matters should be handed over by the Commissioners to the Court of Chancery!

vacation, and 200,000*l.* more in the month of October; they add, "that there is no part of their practice which gives the public such satisfaction as the readiness with which payments are made when the rights of parties are correctly ascertained."

When we consider that only as far back as May, 1849[1], we brought the establishment of this court before our readers, and can now state that all the benefits which we thought would attend it, have been realised, we cannot but hope that our proposition for England will be equally fortunate, and that the landowners of this country will, in matters of Law Amendment, demand "Justice for England."

Our readers may perhaps be tired of authorities for the change which we are recommending. We will, however, give them one more. It is that of Mr. Christie, the conveyancer. In his evidence before the Commissioners, the following questions and answers occur:—

"892. In the foreign registries there are officers appointed who have been made responsible for the validity of titles? — I now see what you mean.

"893. Getting rid of the retrospective deduction of titles by making all transfers judicial acts? — Just so.

"894. Has it occurred to you that any thing of the kind is practicable in this country? — I should have been very much inclined to transfer the title of the land to the money, and pay it into the Court of Chancery, and give a Parliamentary title so, but I do not think we are prepared for that throughout. *I think nothing but that will do.*"

This is a proper and a cautious answer. Mr. Christie thinks that we are not, perhaps, quite ripe for the alteration, but he admits that "nothing else will do;" and this also is our opinion, and further, that a measure of this nature is inevitable.

III. The Simplification of the Law relating to Land.

The Registration and Conveyancing Commissioners hint at "a general revision of the law of property, so as to

[1] 10 L. R., Art. I., "Land Measures for Ireland."

simplify, as far as may be consistent with the benefits of ownership, the interests which may be created in land, to define their limits with precision, and to remove the obscurities and anomalies of the rules which concern them." (P. 57.) We are exceedingly glad that the learned Commissioners have turned their attention to this subject, which is strictly in furtherance of the recommendations of the Land-Burthens' Report; and we do not think that the attempt to effect such simplification can be in better hands than those of the Commissioners. Indeed, we sincerely hope that the Commission will long continue to work together for the public benefit. One great evil of our present system in the absence of a Minister of Justice is, that persons are associated together for a given purpose, and no sooner do they begin to understand each other and work well together, than, the immediate purpose having been served, they are disassociated, and the information they have obtained is no longer kept together. The most easy mode of simplifying the rules relating to the law of real property, would be, we apprehend, to assimilate them in almost all points (with the exception of the law of descent, and more especially that part of it which relates to primogeniture), to the rules relating to personal property. In this case, many of the anomalies and absurdities connected with this branch of the law would altogether cease, and that great question, which is just becoming ripe for discussion, the propriety of keeping up the distinction between Law and Equity, would be forced into notice.

IV. The complete Enfranchisement of Copyholds.

Uniformity of tenure, and the relief of land from the burdensome incidents of tenure, are some of the objects as to which most persons are probably best agreed. This question is making progress, although somewhat slowly. This was shown in the discussion on Mr. Aglionby's bill in the last session. One question has always been, whether any tenant, or any number of tenants, should bind the lord of the manor. Mr. Aglionby proposed that any one tenant, at any time he pleased, should have this power; but this the House of Commons rejected, nor would they allow even a majority of the tenants to bind the lord; but it was proposed by the opponents of the bill that

three-fourths of the tenants in number and value should bind the lord; thus conceding the principle that in certain cases the lord might be compelled to enfranchise. Thus it is that principles slowly gain ground, and their continual discussion in Parliament and elsewhere leads to their ultimate adoption. Under this head we may mention also the enfranchisement of church leaseholds, which has been placed on a satisfactory basis by the first Report of the Episcopal and Capitular Revenues' Commission; and this leads us to

V. The better Management of Land, the Owners of which are under Disability.

This head relates to a large amount of property in the hands as well of the church and of corporations as of private individuals, and among these last, persons having limited estates are to be numbered. The cases in which the law may interfere, and what authority it may bestow, involve useful but difficult questions, the proper solving of which will all tend to unlock the fetters which now bind the land, and to develope its resources. The distinction on this subject between real and personal property, is well drawn in a question in the evidence of Mr. Christie before the Registration Commissioners.

"787. As to the transfer of reversionary interests in personalty, comparatively it is not a matter of public concern whether the transfer be made or not; but if by defects in the system of conveyancing, connected perhaps with a want of registration, land is wholly kept out of the market, that is a great public inconvenience? — Just so; that is, those other properties manage themselves. It is not very material that so much three-per-cents on any other property of that description, which may be misspent but which cannot be mismanaged, and which will be equally productive to the community, whether in the hands of a spendthrift or a prudent person, — it is immaterial whether he is able to sell or not; but if a large estate is in the hands of a person who is greatly incumbered, and disabled from performing the duties of property, then it is highly essential to the community that the law present no impediment to the passing of such lands into better hands."

No better illustration can be given of this than is to be found in the Reports of the Episcopal and Capitular Revenues' Commissioners, who have shown themselves both good

philosophers and practical men. By that Report, and the evidences appended to the first, it sufficiently appears that a large mass of real property in this country has been exceedingly mismanaged, and that frequently all persons connected with it have been injured. "There is little doubt," say the Commissioners, referring specially to church leaseholds, "that, under a different plan of management, the estates might be made to produce a much larger income to the church, and at the same time be held upon a tenure more acceptable to the lessees." (P. 4.)

We have understood that the gain to the church from a better system of management is expected within a short period to be above *half a million* annually. The nature of the powers required in almost all this description of property may be perceived from the following recommendations of the Commissioners.

"We recommend that extensive powers of sale, purchase, and exchange over the property of the church should be vested in the central Board, subject to the restriction that all purchase monies received on behalf of the church should be treated as capital, and be ultimately reinvested in the purchase of real property.

"We think also that provision should be made for empowering such Board to cause to be determined all questions of boundary, and to set out and define the limits of the land where such limits are not sufficiently ascertained, and able to settle all claims for compensation for waste or damage committed."—(1*st Report*, p. 13.)

"We believe," say the Commissioners, in conclusion, "these powers taken collectively with others recommended in their Report, will strip the tenure of church lands of all the really mischievous characteristics of mortmain, while the people of England will have secured to them a progressive fund, forming at least a partial provision for meeting the increase of their spiritual wants." (P. 14.)

Similar advantages would be found to attend the granting like powers to some competent authority over property held by lay corporations and other persons, more or less now under disability in these respects. Probably it will be found advisable to clothe persons having limited estates with powers as extensive as those usually given to them in settlements of land.

VI. An easy Mode of obtaining Advances on the Security of Land.

We have recently[1] glanced at this branch of our subject, and we were in good hopes that the foundation of a better system, so far at least as Ireland was concerned, was laid in the bill brought in last session by the present Attorney-General, "for better securing advances." That bill, however, was much to our regret abandoned, contrary to the wishes, as we believe, of the large body of Irish landowners, and also of Irish lawyers. We trust, however, that it will be again introduced in the next session of Parliament; and we are happy to hear that the Committee on the Law of Property of the Law Amendment Society have recently directed their attention to the subject, and that a Report containing a specific plan on the subject has been agreed upon, and will be brought before the Society at one of its earliest meetings in the ensuing session. In the mean time we may refer to one or two opinions on this subject to be found in the evidence of the Savings' Committee. They refer not only to Sir J. Romilly's project, but to the laws now in operation in the north of Europe, organising the establishment of Land Banks, by means of which the owners of land readily obtain advances on their lands.

"243. Would not the proprietors of estates be unwilling to pledge their estates in many instances? — *Mr. Vansittart Neale:* Each estate is pledged, all being combined in one body, to repay the monies advanced, and having of course remedies over against each other given by law. The man who is primarily liable for each loan is the man by whom the loan is made, and all the other proprietors would have remedies against him if he did not repay. I believe that system works with very great advantage. It enables landowners to borrow money without any investigation of the title of their particular estates. The estates of the district mutually assure each other."

"284. Have you heard of a plan which has been spoken of with reference to mortgages in Ireland, to enable the mortgage to be examined either by an officer or a commissioner, or some party who is able to state that it is good; and then that it may be divi-

[1] 11 L. R. 441.

sible into smaller portions or debentures, which may be taken up as investments by persons of moderate or small property? — *Mr. Stewart:* Yes, I have heard of that plan; and if I understand it rightly, it is an examination into the title by persons qualified to examine, such as the present Commissioners, who to some extent certify that the title is good; and they are prepared to give to either the purchaser or the mortgagee a Parliamentary title, a secure title against all the world. And then the sum lent, after that examination of title, is proposed to be divided into debentures, and those debentures are intended to be transferable. I conceive that nothing can be safer, and nothing can be better, and nothing more practicable. Such a system is in force in Prussia, and has been in use for centuries, or one that is very much the same, and I cannot see why it should not be introduced with advantage into this country.

"285. You think that if it would be good both for the borrower and lender in Ireland, it would be equally good in England? — Yes, and I am certainly surprised that the landowners in England do not insist upon some such machinery, which I believe might be introduced with even greater safety than in Ireland, and for this reason: I think the Committee will find, if they take the opinions of the conveyancing part of the profession, that no titles are more secure or better than the great majority of the titles in this country. The very pains that we have taken under our present system of examination, however expensive and tedious it may have been, has gone, no doubt, to improve and perfect titles: thus you have in this country a state of titles which might be subjected to an examination of the nature that has been referred to with very little difficulty, and I think with perfect success; and I have no hesitation in saying that, so far as my own opinion goes, if the landowners were to render their land available in this way, they might increase greatly its value. One very great difficulty which the smaller class feel in this country is, that they cannot readily borrow money; and I hope most sincerely to find some such machinery as that which has been proposed in Ireland extended to England."

686. "Have you ever considered the possibility of founding a system of debentures upon landed property such as exists in other countries on the continent? —*Mr. Bellender Ker:* Yes.

"687. Do you think that, based upon the security of landed property, such a system might be beneficially adopted, and might be a secure means of investment for the people of this country? —I think in a very short time this Committee and the country will have a better opportunity of judging of that than at present.

If the present Solicitor General's bill passes, with regard to property in Ireland, *I look forward with great hope that the experiments making for the improvement of the law of property in that country will be found beneficial, and will ultimately, after having been tested there, reach this country.*"

We hope, then, to see the establishment, either with the direct sanction of Government, or with such countenance and support as shall entitle it to complete confidence, of some authority that will enable the landowner both in England and Ireland to obtain readily advances of money at a rate of interest proportionate to the security on which the money is lent; which being the best, the rate of interest should be lower than the Government securities.

We may mention that an inquiry on this subject has been instituted by the French Government in the present year, by means of a Commission, which has taken much interesting evidence from eminent bankers and lawyers: some of this evidence we have seen; and we may refer to the French newspaper *La Patrie* for the month of September, but more especially the numbers of the 4th and 9th, for an abridgment of some portions of this evidence. Some extracts will, we think, be interesting to our readers. The German system is thus described: —

"Le principal système est emprunté à l'Allemagne. D'après ce système, les propriétaires qui désireraient jouir des avantages du crédit foncier s'associeraient. Lorsque l'un d'entre eux voudrait emprunter sur sa terre, il la ferait estimer par des délégués de l'association. L'estimation faite, on lui prêterait jusqu'à concurrence du tiers ou de la moitié de la valeur de sa propriété. On lui prêterait à 6 0/0, par exemple. Dans ces 6 0/0, 4 0/0 serviraient à couvrir l'intérêt et les frais du prêt, 2 0/0 seraient employés à amortir le capital au bout d'un certain laps de temps, de telle sorte, qu'au bout de ce temps-là l'emprunteur se trouverait complètement libéré. Mais que lui prêterait-on? de l'argent? non pas. En retour de son obligation, on lui délivrerait purement et simplement des *lettres de gage*, portant intérêt à 3 1/2 0/0, avec lesquelles il se chargerait, lui, de se procurer de l'argent.

"Ces lettres de gage seraient remboursables par séries, ou par voie de tirage au sort, ou bien enfin ne seraient pas remboursables du tout. Mais, comme elles seraient garanties par l'association

des propriétaires, on ne doute pas qu'elles ne pussent trouver aisément des preneurs, alléchés par les 3 1/2 0/0 ainsi garantis. En Allemagne, cette combinaison a généralement réussi; mais les associations allemandes sont composées, pour la plupart, de propriétaires d'élite, et ces propriétaires sont solidaires des engagemens de l'association pour la valeur de toutes leurs propriétés. En outre, la législation leur permet de mettre la main, avec la plus grande facilité, sur les biens des propriétaires qui ne servent pas exactement les intérêts de leurs emprunts."

M. D'Argout, the Governor of the Bank of France, considers that this system is not applicable to the state of property in France. But the reasons he gives, and his description of the state of real property in that country and in Germany, are important in their bearing on the applicability of this system to England.

"En France," he says, "les grandes propriétés sont rares; le sol est devisé en une multitude infinie de petites parcelles.

"Trouvera-t-on facilement des associations de propriétaires riches consentant à se lier par la solidarité, et à hypothéquer en commun leurs biens, sans intérêt pour eux-mêmes, et seulement dans un but d'humanité et de philanthropie, car tout doit se faire gratuitement, sauf le remboursement des frais?

"En France, la solidarité inspire une répulsion hydrophobique; nul ne veut répondre pour autrui. C'est le sentiment général, même en matière de placements commerciaux. *En Angleterre, la solidarité est le droit commun des associations commerciales;* chez nous, on ne place ses fonds dans le commerce ou l'industrie qu'en qualité de commanditaire, ou en achetant des actions émises par des sociétés anonymes; on veut bien aventurer une somme déterminée, mais non compromettre sa fortune tout entière; on tient également à conserver la disponibilité de ses propriétés rurales, sentiment d'ailleurs très raisonnable; car on peut avoir besoin de les hypothéquer pour son propre compte. On a des enfans à établir, des dots à assigner, des améliorations profitables à effectuer, et l'on ne veut pas se priver de la faculté d'emprunts. Mais, en dispensant les associés français de la clause de solidarité, on énerverait profondément les institutions, en faisant disparaître la principale base du crédit.

"Remplacera-t-on l'hypothèque sur les biens et la solidarité par une association de capitaux? Y a-t-il beaucoup de propriétaires possédant des capitaux, et qui veuillent les engager dans ces sortes

d'enterprises? Parmi les propriétaires ayant la faculté et l'habitude de prêter à la propriété, beaucoup préféreront prêter à 5 et à 6 p. 0/0 à des personnes qu'ils connaîtront et qu'ils surveilleront, plutôt que de prêter à 3 on 4 0/0 à des débiteurs inconnus.

"N'est il pas à craindre que ces associations (si toutefois on parvient à en former) ne se composent en partie de propriétaires endettés, obérés, s'affiliant à ces sociétés, afin de se ménager les moyens d'emprunter plus facilement et à de meilleures conditions?

"Ces placemens offriront-ils toute la sécurité désirable? Les garanties à cet égard sont bien plus faibles que dans le Nord. En France, avec une somme de 100,000 fr., on achète une propriété donnant un revenu net de 2 1/2 à 3 p. 0/0. Que l'on emprunte 50,000 fr. sur cette propriété au 5 p. 0/0, amortissement et frais compris, et le revenu total se trouvera absorbé par l'annuité; il faudra que le propriétaire et sa famille trouvent le secret de vivre de l'air du temps pendant trente ou quarante années. Qu'une ou deux mauvaises récoltes surviennent, et voilà l'emprunteur ruiné. Comment veut-on qu'il puisse servir exactement ces mêmes annuités?"

The difficulties are here well stated by the cautious capitalist. But let us turn to his description of the lands in the North of Europe, and the reasons of the success of the system in that country; and let us consider which country England most resembles, Germany or France, as to the state of her landed property.

"Ces contrées," speaking of the North of Europe, says M. D'Argout, "sont aristocratiquement organisées; les propriétés rurales, en général, y sont fort étendues.

"Les associations de crédit foncier se composent de grands propriétaires, volontairement associés sous la surveillance, mais non sous la direction du gouvernement; ils sont liés entre eux par le lien puissant de la solidarité.

"Ces associations sont assez nombreuses; elles n'embrassent que des rayons peu étendus. De là plusieurs avantages: elles connaissent parfaitement la valeur des propriétés sur lesquelles il s'agit de prêter; elles surveillent facilement la conduite et la gestion des débiteurs, et, d'une autre part, elles jouissent du plus grand crédit, car personne ne peut refuser sa confiance à l'association solidaire des plus riches propriétaires de chaque région.

"Ces institutions se sont perfectionnées dans le cours de leur longue existence; leurs combinaisons varient selon les mœurs et les habitudes de chaque contrée.

"Ainsi, telle association prête sans amortissement en stipulant des remboursemens échelonnés; telle autre (et c'est le plus grand nombre) perçoit un amortissement par annuités. Cet amortissement varie dans sa quotité: ici il est de 1 0/0, ailleurs de 2 0/0. La durée des prêts diffère également selon les coutûmes de chaque pays."

We certainly think that some modification of this system might safely be put on trial in this country,—at all events for a limited period, and in some one or more counties; and if we were asked to name a county in which in our opinon for several reasons it might be fairly tried, we should mention the county of Kent.

VII. Further Revision of the Stamp Laws.

We are exceedingly grateful for the act of last session, 13 & 14 Vict. c. 97.[1], remodelling, to a certain extent, the Stamp Laws. Many of its provisions are excellent, and it is altogether founded on right principles. It came into operation on the 10th October, and has done much to simplify and improve the law; and is creditable to the present authorities in the Treasury. By s. 6., the last and not the best relic of the lease for a year, the stamp duty, is swept away, and some doubts arising on the old acts are provided for and disposed of. The Commissioners are now empowered to denote in all cases that an instrument is sufficiently stamped, and thus to preclude all question upon the subject. This particular stamp will require an additional payment of 10*s.*, which will be readily made in all doubtful cases to insure certainty. "A solicitor," says Mr. Tilsley, "when he hands over a deed or puts it away, may now be assured, if he pleases, that he does so with a certainty that, whenever occasion shall call for its inspection, no question can arise as to the stamp duty; and on investigating a title he need not trouble himself about the suffi-

[1] A useful edition of this Act has been published by Mr. Tilsley, the assistant solicitor of Inland Revenues. It contains a full table of all the Stamp Duties now payable, in a manner that easily furnishes the reader with the present state of the law.

ciency of the stamp on any instrument when he perceives the question thus concluded. Again, it will be in the power of any person, who is about to proceed to the trial of an action in which a document may be required to be produced, to provide against the rejection of it in evidence, on the ground of an insufficiency of the stamp upon it." It was fair, however, that some appeal from the opinion of the Commissioners should be given; and it is accordingly provided, by s. 15., that a case for the opinion of the Court of Exchequer may be stated, and may be argued on both sides before that Court. There is also a variation in the mode of imposing *ad-valorem* duties on conveyances upon sales, as a per-centage is now adopted and carried on *ad infinitum*, not stopping, as before, at 1000*l.*, where the purchase-money exceeded 100,000*l.* "The new duty," says Mr. Tilsley, "is 10*s.* per cent.; the repealed duty was as near an approximation to 1*l.* per cent. as was doubtless considered practicable. With the exception of the first few items, the duty on the mesne sums in the different steps of the scale was precisely 1*l.* per cent. The reduction, therefore, is very great, and *the loss to the revenue will consequently be serious*, as no advantage will in any case be gained where the purchase-money does not exceed 200,000*l.*" (P. 19.) We differ, however, with Mr. Tilsley as to the probable loss to the revenue. We admit that the reduction of the duty will be a boon to all small, and many large, dealings in land; but we believe that it will encourage, and greatly increase, these dealings, and more especially if all conveyancing difficulties are removed, and thus there will be a gain and no loss to the revenue, at the time that all other interests are benefited. This is the view of this part of the subject for which we have always contended; and while we willingly acknowledge the benefits that this act will confer, and admit that it is safe and proper that in matters of revenue Government should feel its way, yet we trust and believe that the experience thus gained will justify the adoption of more extensive measures of relief; and that while the Government is no loser, all other classes, and more especially the landowners, will be great gainers.

In the mean time it is not improbable that this act may

lead to some alteration in conveyancing costs and practice. We understand that many respectable solicitors are disposed to avail themselves of this opportunity of fixing a scale of conveyancing charges, and of giving the public the full benefit of the reduction of the duty. We may also suggest that this would be an advantageous time also to commence a change which the enlightened portion of the profession must see is inevitable, — we mean the discontinuance of remuneration by the length of the instrument, and the substitution of some other mode of remuneration; and that suggested by the New Stamp Act — a charge *ad valorem* — would be far more proper and reasonable than that by length.

An important bill on this subject has been before Parliament for the two last sessions, which would have allowed the taxing officer to take matters into his consideration, other than the mere length of the instrument. We regret that this measure had to encounter the formidable professional opposition which it met with in the House of Commons last session. Although it had passed the House of Lords, it was assailed by that effectual, although quiet mode of attack which delays and thwarts, rather than openly opposes. We regret exceedingly to have found as parties to this opposition the two respectable societies, the Law Institution and the Metropolitan and Provincial Association, composed, we believe, exclusively of attorneys and solicitors, and other provincial societies composed also of that branch of the profession. We had hoped that in the present era, when time, the great innovator, is softening prejudices and smoothing away difficulties, a better feeling would have prevailed. We shall use no harsh expressions, and, we trust, pursue no uncharitable thoughts; but perhaps it may be of some use to give the origin of this bill, with which we have been favoured, and which we know to be correct.

A barrister, in practice as a conveyancer, had prepared a draft of conveyance to a railway company. Many of our readers know that under the Lands Clauses Act, a deed prepared in the form given in the schedule to that act has peculiar power and advantages given to it by the act. There were about twenty conveying parties to the deed, and if it had

been prepared in the ordinary form, reciting the whole history of the transaction, its length would have been enormous, and the expense to the company would have been very considerable. The barrister did not think himself justified in not adopting the parliamentary form; but this simply required the correct description of the parties, and the short form of conveyance, and reduced the fee for the preparation of the draft to one guinea. On giving the draft to the solicitor, the barrister told him he had prepared it in this form; that he was content thus to reduce his own fee, but that he should have been glad if he could have found some means of giving a remuneration to the solicitor, proportionate to the value of the land conveyed, and to the responsibility incurred, and not measured only by the length of the conveyance. It was then suggested that a bill of this kind that we are referring to might be brought in advantageously; which was done accordingly, and passed the House of Lords.[1] It has thus happened, however, that a Bill brought in for the express benefit of solicitors, has been thus vehemently, and so far successfully, opposed by them, and its promoters have been held up to professional odium as the enemies of those words of fear, "*the interests of the profession.*" Let us hope that a better and wiser feeling will prevail, and that in the next session this bill will be allowed to pass; and we are satisfied that the profession would be the first, in various ways, to find the benefit of it even in that part of their attire in which they are sometimes the most sensitive, the breeches pocket. In a late case[2], Lord Langdale said, "I am exceedingly sorry to say that the rules as to the costs allowed to solicitors are on a most unsatisfactory footing. I believe that they continue on that footing, because nobody has as yet been able to suggest any mode of taxing the costs in a more satisfactory manner, and *this shows a want of ingenuity in the profession which surprises*

[1] The proposed enactment is that in taxing any bill for preparing and executing any deed, will, or instrument in writing, it shall be lawful for the taxing officer, and he is required in estimating the proper sum to be charged for such transaction, to consider not the length of such deed, &c., but only the skill and labour employed, and the responsibility incurred in the preparation thereof.

[2] Stephen *v.* Lord Newborough, 11 Beav. 411.

me." And yet any attempt to get rid of the present confessedly unsatisfactory mode of taxation is opposed. Let us hope for better days, and wiser conduct!

VIII. Simplification and Abbreviation of Common Forms.

This brings us to a subject which we have already repeatedly adverted to, — the shortening and simplification of common forms; and on this subject the learned Commissioners also promise their opinion and assistance in future Reports. In the mean time they seem to have made rather merry, with Mr. Christie's assistance, over the Conveyancing Acts of 1845, and with the bulk of the observations so made we agree. We shall not, however, shrink from any share of responsibility that we may have had as to those acts, and we may be allowed to say they have not been the entire failure which is here supposed. How far they have been directly acted on it is impossible to say; but even here, we apprehend, that abstracts are now disclosing that they *have* been adopted, although certainly not to a great extent. But their indirect effect has been considerable, and all that their promoters could wish. Indeed, in Mr. Christie's observations on the present practice as to long and short forms, he draws his conclusions rather from the excellent school of conveyancing of which perhaps he is now the head, than from what we fear is the general practice of the profession throughout the country. Speaking of covenants for title, he says, "The whole is included probably in a page." (Qu. 963.) Surely they are not usually included in so short a space, — certainly not in our humble experience.

Some of the common forms Mr. Christie admits to be unnecessary.

"983. Do not you think you might get rid in many cases of all that long part of a deed, the powers of entry and distress; they are of very little use?—I fancy the powers of distress might very well be omitted in tenures of rent-charges. *I never exactly understand why they were introduced.*

"984. *Yet they are introduced generally into settlements?* — *Generally they are.*"

Again:—

1004. "Some forms are introduced as to the 'reversion,' &c. to obviate doubts that existed at that time; and when those doubts were removed, the forms remained?—*Just so.*"

Now in these questions and answers we find the whole case admitted by the best authority against the present use and abuse of the common forms. Our charge is, that forms are constantly inserted in deeds the reasons for which have long since ceased, and that the forms that are inserted are unnecessarily long. While we say this, we confess that we should be quite willing to leave this branch of conveyancing reform in the hands of the learned Commissioners, and of that class of conveyancers of which Mr. Christie may be considered as the representative; and we may observe, that we are particularly struck with many of the observations made by him in the course of his evidence, and more especially with his remarks as to the use of recitals.

There are other branches of the law of real property which will require careful attention and regulation, to two of which we have devoted separate articles in this number.[1] We believe that no subject is so important as this branch of the law; and that no measures are so necessary, or would be found more useful to all classes of the state, as those to which we have referred. They would draw forth the real uses of the land, and develope its resources; they would unquestionably increase its value; and they would enable the landowner to part with his commodity easily if he wished it, or to render his possession of it much more valuable.

One word in conclusion. The subject which we have here endeavoured impartially to discuss has risen from being a mere question interesting to conveyancers to be one important to the whole country. In its proper consideration is involved the policy of the future government of the United Kingdom.

[1] See Art. IV.—The Usury Laws, and Art. V.—Tenant Right in Ireland.

ART. II.—NAVAL ENLISTMENT AND IMPRESSMENT.

THE labours of the Peace Congress are not yet sufficiently far advanced to divert our attention from some of those legal topics, which the outbreak of war may suddenly bring into very serious consideration. Public liberty has made such rapid advances since the fall of Napoleon, that a new war would probably excite an uncompromising opposition to practices, which in times past were familiar, though by no means acceptable to the country. The "mariners of England" are a class whose social interests are now warmly espoused by public men; their civil rights are deeply affected by a foreign war, and it may not be a useless task to ascertain their legal position with reference to voluntary and compulsory service in the fleet.

The state of the law regarding the impressment of seamen has frequently been denounced as a blot upon the English constitution. Many years have elapsed since any question connected with this subject has come before the Courts of Law; but notwithstanding the numerous opportunities which the long continuance of peace has afforded for remedying the foreign and domestic evils arising from the practice of impressment, no competent provision has yet been made by law for recruiting the sea service with volunteers in time of war.

The land-service was anciently well maintained, according to the existing state of the art of war, by the feudal system of military tenures, under which all the landholders of the realm were bound to attend the king to the field. But no naval services were due to the Crown, except those of the Cinque Ports, and a very few others, which altogether were too inconsiderable to be mentioned, and bore no proportion to the exigencies of the nation in time of war.[1] In consequence of this state of things, two methods of manning the fleet are

[1] Foster's Crown Law, pp. 174, 175.

recognised by law,—one by voluntary enlistment; the other by impressment, or compulsory levy. With regard to soldiers, the Crown has, both by common and statute law, an undoubted right to require the personal service of every man capable of bearing arms, in case of a sudden invasion of the realm, or a formidable insurrection; and the allegiance due from the subject renders it incumbent upon him to assist his sovereign on such occasions[1]; yet, except on such emergencies, the Crown has no legal power to compel any man to take arms in the land-service.[2] With the navy, however, a different rule of law prevails; and as to all those persons who fall within the description of seamen or sea-faring men, the Crown may, by the common law, compel them, even in time of peace, to enter or re-enter the navy by forcibly impressing them. And as landsmen are liable to serve in the militia in extreme emergencies, it is considered by no means unfair that seamen should, on like occasions, be bound to render service on that element, where they alone are capable of usefully exerting themselves for the defence or welfare of the country.

The legal modes of raising men for the naval service will therefore be considered under the two following heads:—I. Enlistment; II. Impressment.

I. *Enlistment* is a voluntary tender of service, and is distinguished by its voluntary character from all other methods of levying men. At each of the principal sea-ports there is a rendezvous, at which a naval officer receives the names of volunteers for the fleet. It is notorious, however, that great difficulty is often found in manning ships of war by this process, notwithstanding the various inducements held out by Act of Parliament to voluntary enlistment; yet, as a general rule, recourse is never had to impressment during peace, unless under an apprehension of immediate hostilities, which permit no delay in mustering the necessary force for the weal of the realm.

Formerly enlistment was unlimited in respect of its duration. No volunteer could claim his discharge as a matter of right until his ship was paid off; and this term of service was

[1] Foster's Crown Law, 158.; stat. 16 & 17 Car. 1. c. 28.
[2] Foster's Crown Law, 157. 175.

often harshly prolonged, by summarily turning men over to a newly-commissioned ship, whose complement was deficient. It behoved the Government to find a remedy for these and other evils; and with this view a very beneficial Act of Parliament was passed in the reign of King William the Fourth, "for encouraging the voluntary enlistment of seamen, and more effectually manning the navy." (Stat. 5 & 6 Wm. 4. c. 24.) By this act enlistment in the navy is now regulated; the duration of the service of seamen in the navy is limited (s. 1.) to five years, computed from the day of entering; and no person is liable to be detained against his consent in the naval service of the Crown after the expiration of that term unless he shall have voluntarily entered for a longer term. At the expiration of the term he is entitled to be discharged forthwith, if the ship in which he is serving be within the United Kingdom: and in case the ship be on a foreign station, then, on signifying to the captain or commanding officer his wish no longer to continue in the service, he is either to be discharged forthwith, if he desire it, or sent by the first convenient opportunity in some ship of the navy to a home port to be there discharged. But if, in cases of special emergency, the admiral or commanding officer of the fleet or squadron in which volunteers are serving shall deem it hazardous to discharge such men, he is at liberty to detain them in the service for six calendar months, or until the emergency shall have ceased; and for such extra service every man so detained is to receive additional pay, amounting to one-fourth of the ordinary pay of his rating.

The act goes on to provide, that seamen under arrest for offences shall not be discharged until after trial and punishment, or other discontinuance of the arrest; and that no seaman entitled to his discharge shall be exempt from the performance of nautical duty, or the discipline of the navy, until he shall be actually discharged.

The same act also provides (s. 2.), "that every seaman who may have served for five years while any proclamation calling for the services of seafaring men shall have been in force is, upon his discharge, to be furnished by the captain or commanding officer of his ship with a certificate of such

service, containing a description of his age, person, and place of birth; and every seaman obtaining such certificate is, upon production thereof at the Admiralty, to receive, *gratis*, a protection from service in the navy for two years; such protection to be under the hands of two or more Lords of the Admiralty: but if any seaman entering for five years be discharged before the expiration of that time, he is to be entitled to such a protection for one year only; and if the discharge take place on his own application before the five years are expired, he is entitled to no protection."

In order to encourage volunteers, the act provides (s. 4.) that every seaman or sea-faring man who shall, within six days after the issue of a proclamation calling for the services of such men, enter himself with any officer authorised to receive volunteers for the navy, shall (in addition to the advantages[1] given to volunteers by the act 11 Geo. 4. c. 20.) be entitled to receive double the amount, according to his rating, of the bounty offered by such proclamation. Seamen serving at sea in merchant vessels, when the proclamation appears, entitle themselves to like double bounty by entering themselves with an officer of the navy within six days after arrival in any port of the United Kingdom, or within half an hour after any officer of the navy shall have visited the ship before her arrival in port.

When any proclamation is issued by the Crown, calling for the services of sea-faring men, the same act directs (s. 5.) that seamen then serving in the fleet shall not be entitled to be discharged, but shall continue to serve for a further period of five years, if their services be so long required. Seamen thus circumstanced become entitled to the bounty granted to seamen of the same class on entering the service: and, at the end of the term of five years for which they are detained, they are entitled to their discharge, in the manner already mentioned with respect to volunteer seamen.

By s. 6., if seamen whose statutory term of five years

[1] These advantages consist in the right to receive a certificate of entry, which entitles the volunteer to immediate wages from the time of entry, conduct money, and an advance of two months' wages as soon as he is borne on the books of a ship.— *Stat.* 11 *Geo.* 4. c. 20. s. 2.

expires while a proclamation for seamen is in force, signify to their commanding officer, before the expiration of such term, their desire to continue in the service for a further period of five years, they are allowed to re-enter, and become entitled to the single bounty offered by the proclamation to volunteers of the same class and rating: and every such volunteer, at the end of his second term of five years, is to be entitled to his discharge, under the same regulations as persons discharged after five years' service under the previous clauses of the act.

By s. 7., Pensioners, able-bodied and fit for duty, voluntarily enlisting while any proclamation for seamen is in force, are to be received to serve in the navy; and, in addition to their regular pay and all other advantages, they are to draw their pensions, while so serving and faithfully discharging their duty.

Seamen belonging to the British colonies are, by s. 8., declared entitled to the benefits of the act; and all colonial seamen, on their discharge at the expiration of five years' service, are entitled to a free passage back to their own colony, or a gratuity in money sufficient to cover the cost of their return, at the discretion of the Admiralty.

By the same act (s. 9.), seamen desirous of being discharged before the expiration of the period of five years for which they are engaged or bound to serve, may provide one able seaman, or two able-bodied landsmen, to serve as substitutes for five years (if so long required); and are entitled, upon approval of such substitutes by the Admiralty, and upon their being actually received on board any ship of war, to be discharged, as if they had completed their own term of service for five years.

By a recent statute (10 and 11 Vict. c. 30.) boys under sixteen years of age, entering the navy, may be detained in the service, either with or against their own consent, for the term of seven years; at the expiration of which time they are entitled, like the seamen, to be discharged on their own request, unless the admiral or commanding officer of the fleet or squadron in which they are serving thinks fit, in cases of

emergency, to detain them for an additional period of six calendar months, or until the emergency shall have ceased.

At the expiration of the term for which a seaman has enlisted, he thus appears to have a positive legal right to his discharge; and nothing but the occurrence of any of the cases or emergencies specifically contemplated by the foregoing Acts of Parliament, can justify an officer in detaining a man from his ordinary liberty as a citizen, or compelling him to the performance of naval duty after his term of service has expired.

Formerly smugglers were sentenced, on conviction, to serve a certain number of years in the navy; but no provision was made for sending such persons home, when serving on foreign stations, or for regulating their service after the expiration of their sentences. A seaman in this situation a few years ago, after serving the time specified in his sentence, refused to do further duty on board the vessel wherein he had gone to sea: and a question arose whether he was any longer subject to the discipline of the ship as one of the crew, so as to be liable to punishment for disobedience of orders. It is conceived that as penal laws are always to be construed most strictly to the letter, his service being in the nature of a penalty, could not be extended against his will one hour beyond the time limited by the sentence of the law. But this point has been set at rest for the future by an Act of Parliament (11 Geo. 4. and 1 Wm. 4. c. 10.), which enacts that the Admiralty shall instruct all admirals and the commanding officers, that about the time when any seaman serving under sentence for smuggling shall become entitled to his discharge, he shall be sent home "by the earliest convenient opportunity:" and if his sentence expires before the ship in which he is sent home, or to which he belongs, arrives in port, he is to be discharged within ten days after her arrival: and if it expires while the ship is in port, he is entitled "to be discharged forthwith;" but until his actual discharge, he is not exempted from the duties of the service.

There seems, however, to be no *statutory* power for a commanding officer to detain such a man, like a regularly enlisted

seaman, for the good of the service in cases of danger or emergency.

The statute 5 and 6 Wm. 4. c. 19. s. 39. enacts, that no parish or voluntary apprentice to the sea service shall be at liberty to enter the navy without the consent of the master of his ship; and masters shall be entitled to receive the wages of apprentices entering the navy. And where a mariner quitted a vessel in defiance of the master, and entered on board a man of war within twenty-four hours, this was held by the Court of Admiralty to be as desertion which worked a forfeiture of his previous wages.[1]

But a seaman impressed into the royal service is entitled to the proportion of his wages previously earned on board of the merchantman, if the ship arrives at its port in safety. If, however, the vessel be lost, he loses those wages in common with the rest of the crew.[2]

It is stated in the work of a learned writer, that prestmen are not subject to the articles of war, until actually rated on board of a ship of war.[3] It may therefore be presumed that volunteers entering at a rendezvous are in the same position.

II. *Impressment* is the compulsory levy of men for the service of the royal navy: and though in ancient times soldiers were raised in this way for the land-service, that practice is no longer lawful[4]; and the term *impressment* is now usually applied only to the naval service. Impressment is a legal process, and is so described by the highest authorities. "Impressment in time of war (says Mr. Justice Foster, writing in the reign of George II.) appeareth to me to be grounded on Common and Statute Law; in other words, upon a general immemorial usage, allowed, approved, and recognised by many Acts of Parliament.[5] . . . . . Magna Charta hath been expressly and by name confirmed by many Acts of Parliament: my Lord Coke saith thirty-two. And yet the practice of pressing mariners still continued through all ages, and was

[1] The Amphitrite, 2 Haggard's Admiralty Reports, 403.

[2] Abbot on Shipping, 6th ed., p. 544.
2 Browne's Admiralty Law, 527.

[4] Stat. 16 & 17 Car. 1. c. 28.

[5] Foster's Crown Law, p. 174.

never, that I know of, once mentioned in any of those acts as illegal, or a violation of the Great Charter."

"The question" (says the same learned judge) "touching the legality of pressing mariners for the public service, is a point of very great and national importance. On one hand a very useful body of men seem to be put under hardships inconsistent with the temper and genius of a free government. On the other, the necessity of the case seemeth to entitle the public to the service of this body of men, whenever the safety of the whole calleth for it. . . . . The question is not, whether people may be taken from their lawful occupations at home, and sent against their wills into a remote and dangerous service, into a service they are utterly unacquainted with, and possibly unfit for. No; the only question is, whether mariners, — persons who have freely chosen a sea-faring life, persons whose education and employment have fitted them for the service, and inured them to it,— whether such persons may not be legally pressed into the service of the Crown, whenever the public safety requireth it, *ne quid detrimenti respublica capiat.* For my part, I think they may. I think the Crown hath a right to command the service of these people, whenever the public safety calleth for it; the same right that it hath to require the personal service of every man able to bear arms, in case of a sudden invasion, or formidable insurrection. The right in both cases is founded on one and the same principle, — the necessity of the case in order to the preservation of the whole."

The opinion of Lord Mansfield, as delivered by his Lordship in the Court of King's Bench in the case of Rex *v.* Tubbs[1], as to the general law and ancient practice of impressment, was to the same effect. "The power of pressing is founded," says his Lordship, "upon immemorial usage, allowed for ages. If it be so founded and allowed for ages, it can have no ground to stand upon, nor can it be vindicated or justified by any reason, but the safety of the state; and the practice is deduced from that trite maxim of the constitutional law of England, 'that private mischief had better be submitted to

[1] Cowper's Reports, 512.

than public detriment and inconvenience should ensue.' To be sure, there are instances where private men must give way to the public good. In every case of pressing, every man must be very sorry for the act, and for the necessity which gives rise to it. It ought therefore to be exercised with the greatest moderation; and only upon the most cogent necessity."

There are also numerous statutes, which recognise and bear reference to the practice of naval impressment from a very early period of our history. It is true that none of these either authorise or regulate the practice in express terms; but, on the other hand, they neither abrogate nor censure it. Upon this Mr. Justice Foster makes the following remarks: —

"I do admit that I know of no statute now in force which directly and in express terms empowereth the Crown to press mariners into the service. And admitting that the prerogative is grounded on immemorial usage, I know of no necessity for any such statute. For let it be remembered, that a prerogative grounded upon general immemorial usage not inconsistent with any statute, nor repugnant to the public utility, is as much part of the law of England, as statute-law. . . . The statutes which mention pressing as a practice then subsisting and not disallowed, are at least an evidence of the usage, if they go no farther; I mean if they do not amount to a tacit approbation of it. For it is hard to conceive that the legislature should frequently mention a practice utterly illegal, and repugnant to the principles of the constitution, as subsisting, without some mark of disapprobation."[1]

From these authorities it appears that the law of England is clear as to the legality of impressment, and that the principle of the law is the insuperable necessity of the case for the public weal. It seemed desirable to set this point in an unquestionable light, as the power of impressment is by many deemed to be an arbitrary stretch of regal power, unsupported by any colour of law; whereas the common law is, in truth, the foundation of the practice. It is undeniable,

[1] Forster's Crown Law, p. 168, &c.

however, that press-warrants, and especially in early times, have been made the instruments of great oppression to private individuals; and that the abuse of the power has given rise to erroneous notions respecting its intrinsic legality.[1]

With respect to the usage in the matter of pressing mariners, Mr. Justice Foster[2] states that he had met with a multitude of commissions and mandatory writs to that purpose, conceived in various forms, and from time to time directed to different officers, as the nature of the service required.

Some are for pressing ships;

Others for pressing mariners;

And others for pressing both ships and mariners.

In some, the parties to whom they are directed are required to make a general impress upon certain great and emergent occasions. In others, they are confined to a certain number of ships and mariners for special services; and in others they are still further confined to certain places on the coast.

Some commissions, particularly those conferring the Admiralty jurisdiction and the right of Admiralty, warrant an impress as often as there shall be occasion. Others empower commanders of fleets or squadrons, intended for certain expeditions, to press for that particular service; and others empower masters of particular ships to press for manning their respective vessels.

But the general power of impressment to be exercised whenever the public service might so require, seems always (with rare exceptions) to have been contained in the commission of the Lord High Admiral for the time being, as an incident of his office, without regard to the existence of any present hostilities or other emergency: and during such com-

[1] It is recorded of Sir Matthew Hale, that at an early period of his professional life, he had degenerated into great slovenliness in his apparel; and that when he was walking one evening for his health on Tower Hill, he met a press-gang, who supposing him from his appearance to be in a low condition of life, and finding him strong and well built, seized him as a person fit for the king's service. He would have been speedily shipped off for the West Indies, but for the lucky presence of several students of Lincoln's Inn, who knew him, and obtained his liberty by vouching that he was no seaman, and that he was of gentle degree, notwithstanding the tattered condition of his doublet and hose. — *Lord Campbell's Chief Justices.*

[2] Foster's Crown Law, p. 160.

missions, whenever an impress has been ordered, it has been by warrants from the Lord High Admiral. That office, however, having for the most part been in commission ever since the Restoration, the service of impressment has in later times, and during such commissions, been carried on by warrants from the Admiralty Board, grounded on orders made from time to time by the king in council, as the exigencies of affairs have required[1]; the commissions of the Lords of the Admiralty being silent as to such powers. In the times of the Commonwealth, when there was still no strong line of separation between the professions of a soldier and a sailor, and men were wanted to fight the naval battles of England against the Dutch, they were drafted from the army. Thus, on Sir George Ayscough being put in command of a fleet to cruise against the Dutch in 1653, the Council of State ordered a certain number of foot-soldiers to be summarily drafted out of every regiment, and five hundred of these were sent on board Ayscough's fleet. They were instantly brought into action, and consequently had no time to grow displeased with the confinement and tedium of a sea-faring life.[2]

Press-warrants are issued under the hand of two or more of the Lords of the Admiralty, and usually direct the officers intrusted with the execution, "to impress or cause to be impressed so many seamen and sea-faring men, and persons whose occupations and callings are to work in vessels and boats upon rivers, as shall be necessary," &c.

But though press-warrants are so general in their terms, many sea-faring persons enjoy exemption and protection from their operation. "The liability to impressment being founded on immemorial usage, there can be no doubt (says Lord Mansfield) but that there *may be* an exception out of it on the same foundation, upon immemorial usage. What has been approved by immemorial usage allowed for ages, is always supposed to have had a good beginning. Therefore, if the exception or exemption stand on that ground, it is

[1] Foster's Crown Law, p. 166.

[2] Goodwin's History of the Commonwealth, iii. 395. 443.

as good as the institution itself."[1] This doctrine applies to common-law exemptions, which thus appear to be *possible*, and to be available, if proved. But, says Mr. Justice Buller, "I believe the only excepted case in the books, which does not rest on the Statute-Law, is that of a ferryman, who, it is said in one old case, is exempted from being impressed."[2] This, however, must be understood of a salt-water ferry only; a fresh-water ferryman being no more privileged than any other boatman upon a river.[3]

An exemption *out of the description* of persons, to whom the press-warrant extends or applies, is, and must be of course, a protection. Landsmen, therefore, are in this sense exempt from impressment at common law: and Lord Mansfield has said, it would be absurd to suppose that private gentlemen amusing themselves with yachts came within the description of persons liable to impressment. "Persons liable must come purely *within the description* of seamen, sea-faring men, &c. He, therefore, who is not within the description, does not come within the usage [of impressment]. The commission is not to press landsmen, or persons of any other description of life, but such men as are described to be sea-faring men, &c. Officers are not within the description."[4]

It appears also that the sea-faring character, which renders a man liable to impressment, is not indelible: and that a man who has *bonâ fide* quitted a maritime life, and betaken himself to other pursuits, is in effect a landsman, and equally exempted from impressment. In 1810 this question came before the Court of Session in Scotland, in the case of one Wylie[5], who, when under fourteen years of age, had gone a voyage to America, and was then apprenticed to a shoemaker. He served his apprenticeship regularly, and afterwards worked as a journeyman. After some time he went two voyages, one to America, and another to Memel: but for several years before he was impressed he had never been from

[1] Judgment in Rex *v.* Tubbs, Cowper's Reports, p. 512.
[2] Exparte Fox, 5 Term Rep. 277.
[3] Viner's Abridgement, tit. Ferry.
[4] Per Lord Mansfield, C. J., Cowper's Reports, 519.
[5] Nash *v.* Wylie, Morison's Dictionary of Decisions, tit. Impress Service.

home, except on two or three short excursions to fish for herrings. His usual occupation had been either in his original trade of a shoemaker, or as a labourer at a distillery. His name also was for two years in the militia ballot-box. In this state of circumstances, he was impressed by Captain Nash. Wylie then applied to the Court of Session for his discharge, and it was argued on his behalf that the naval character is not indelible, and that press-warrants extend only to persons actually following a sea-faring life, or those who withdraw themselves, or temporarily change their occupations in order to avoid the impress. The only answer on the part of Captain Nash was, that the strongest evidence should be required of the relinquishment of the sea-faring character. The Court held Wylie not liable to impressment, and ordered his discharge.[1]

"In what situation a seaman can be fairly said to have quitted the sea as a profession, is in general an arbitrary question, depending upon particular facts and circumstances. In the case of Marshall, where two of Mr. Cunningham the jeweller's men were impressed, and presented bills of suspension, they had different fates. One was an apprentice, and the other a journeyman; neither of them had been long absent from the sea. The man who had bound himself was held to have thus given complete evidence that he had abandoned it permanently, since, in fact, he had no power to return to it: but as to the other, who had begun merely to work at day-wages, this was not held to be such a dereliction of the sea as to exempt him from the impress."[2]

There is no doubt that the Crown may exempt or grant a protection from impressment to any particular class of sea-faring men, because the Crown alone has the power, through its officers, of issuing press-warrants. In those instruments the officers are directed not to impress any person protected by the Navy Office, Victualling Office, &c. Even the officers themselves grant protections: *à fortiori,* therefore, if

[1] See also Sopwith *v.* Wollaston, coram Mr. Justice Heath, 2 Medland & Weobly's Remarkable Trials, 341.

[2] Per Lord Justice Clerk, of Scotland, in M'Arthur *v.* Campbell, Buchanan's Remarkable Cases in the Court of Session, p. 60.

the officers and inferior boards can do so, the Crown is entitled by its prerogative to the same privilege.[1]

Thus seamen cannot in general be impressed from transports and victuallers serving under contracts with the Government. Such vessels are required by their charter-parties to have a given number of men on board; and it would be impossible to do justice between the owners and the Government, if the latter were allowed to seize the seamen of the former. The detriment to the public service by the impressment of such men is also obvious, and protections for the requisite number are accordingly issued by the Navy Board and Victualling Board on taking up ships for these services. In Lord Nelson's Dispatches (vol. vi. pp. 314, 315, 316.) will be found the particulars of a case, in which men impressed from a transport were, by his Lordship's order, restored to their own ship. On that occasion Lord Nelson issued a general order to all captains of ships in these terms: "You are hereby required and directed, on no account or consideration whatever, to impress either mates, seamen, or boys from any of His Majesty's regular or hired army or navy transports, or victuallers, *unless they shall be found drunk or rioting on shore;* in which case, I presume, it may be proper to impress them for His Majesty's ships-of-war." The propriety of this last clause of his Lordship's order is nevertheless extremely questionable in point of law.

Protections, however, which are granted by the Admiralty and the Navy Board, and other public departments, are revocable at pleasure, even though granted for an absolute specified time; and in this respect they differ palpably from statutory protections, which can be disregarded only in cases of actual invasion of the realm, or imminent dangers thereof, or some other overruling necessity. On the 15th June, 1812, Edward Herbert applied to the Court of King's Bench[2] for his discharge from the impress, and proved that on the 31st December, 1811, he being master of the Nantwich, of 152 tons, obtained from the Admiralty an instrument called a ship's protection of that date for three months, for which the

[1] Chitty on Prerog. p. 48.

[2] Herbert's case, 16 East's Reports, 165.

sum of ten shillings was paid, enjoining all commanders, &c. of the king's ships not to press twelve men and boys belonging to the Nantwich, provided their names, ages, and descriptions were inserted on the other side of the instrument, and provided they were actually on board, or in the immediate service of the vessel, and the protection was also kept on board. Herbert was chief mate, and already within the terms of the protection; but he was impressed on the 1st February, within three months after its date, and was still detained. It was argued for Herbert, that the trade of the country would be exposed to the greatest danger and inconvenience if the acting commander of a vessel, charged with the specific custody of a cargo on board, could be pressed at a moment's warning, against the faith of a protection actually in force at the time. The counsel for the Admiralty contended that these protections, though usually observed, except in special exigencies of the naval service, were mere matters of favour, revocable at pleasure: and the Court of King's Bench agreed to this, and said that whatever the indulgence of the Admiralty might be on these occasions, neither that Board nor the Court could give any protection from impressment beyond what the legislature had provided in certain cases, in which the present was not included; that such an instrument could have no effect against the exigency of the public service, and that the circumstance of the press-warrant being of earlier date than the protection made no difference.

The courts of law will discourage unfair proceedings on the part of the naval authorities, in exercising the right of impressment in the face of protections thus issued. Accordingly, in Goldswain's Case [1], the Court of Common Pleas were much inclined to hold that a protection from the Navy Board was a sufficient ground for his discharge from impressment under an Admiralty warrant, which directed a general press to be made on the 17th March, 1778, at night upon the Thames, without regard to any protections save such as were created by Acts of Parliament, and except officers of merchantmen of fifty tons and upwards. It appeared that Gold-

[1] 2 Blackstone's Reports, 1207.

swain was a bargeman on the Thames, and was at the moment of his impressment actually employed in carrying timber to the King's Timber-yard at Deptford, under the faith of a protection from the Navy Board, dated on the 11th March, and before the date of the Admiralty warrant. He had no other ground of privilege. He was put on board a tender, and on the 25th March was sent to H. M. S. Conquestadore, whence, on the next day, he was turned over to H. M. S. Russel, Captain Drake, to whom a habeas corpus was issued on the 1st of April, in order to bring the case under adjudication. Goldswain was not brought up in obedience to this writ, but was kept on board the Russel till the 9th May, when he was transferred to the Nightingale tender, Captain Herbert, on whom a new habeas corpus was served, by virtue of which Goldswain at last appeared at the bar, several weeks after his first application for his liberty. The Counsel for the Admiralty avowed the impressment, and denied the validity of the protection. He said that the 16th March was a time of most urgent necessity; that the French ambassador had just made his declaration of an alliance with the insurgent American colonists; and that the press-warrant was a revocation of all previous protections. He also justified, from usage and policy, the issuing of protections, which put the seamen off their guard, and drew them from their lurking places, and then sweeping them off by a special press-warrant, in which no protections were to be regarded. But Lord Chief Justice De Grey and the whole Court expressed their disapprobation of a measure so insidious, and so contrary to good faith and common honesty. They had surmised that some jealousy existed between the Navy Board and the Admiralty, and that this case was brought before the Court to decide upon the validity of Navy Board protections against Admiralty warrants; but that it now appeared the whole contest was about a poor fresh-water sailor, who had engaged in the King's service, and come fifty miles down the river on the faith of a public protection, for a service altogether as necessary to the fleet, as the assistance of any individual mariner. The Court wished the Admiralty to consider the propriety of such a proceeding, not to mention

the indecent delay in obeying the first habeas corpus. They were inclined to think it their duty immediately to liberate Goldswain, and should therefore in some measure do it, but still with a reserve of any question of law which the Admiralty meant seriously to argue. They, therefore, discharged Goldswain on his own recognisance of 20*l.*, to appear in Court on the second day of next term, on which day Goldswain appeared accordingly, and was then discharged by consent of the counsel for the Admiralty.

Masters and mates of merchantmen are not, by virtue of their office, exempted from impressment. But, in the following case, the Court of King's Bench seemed to think that the master of a collier ought not to be impressed, unless upon occasions of extreme and pressing necessity. In 1811, one Chalacombe, the master and part owner of a coasting collier, was impressed, and applied to the Court of King's Bench for his discharge by habeas corpus. The counsel for the Admiralty, in opposing the application, denied that Chalacombe had any exemption of right; but represented that general directions were given, as a matter of grace and favour, not to press sea-faring persons of this description. Lord Ellenborough, C. J.: — "Considering it merely as a question of discretion, is it not more fit that this should stand over for the consideration of the Admiralty, to whom the matter ought to be disclosed? This is a most useful and highly meritorious service: and it is not discreet that a right of this kind should be pushed to the extreme." After some hesitation expressed, his lordship added, "As it is a question of great public importance, let the writ go, and the officer may make what return he shall be advised." The case was never discussed again; for the lords of the Admiralty, on being apprised of the circumstances of the case, and of what had passed in court, ordered Chalacombe to be discharged.[1]

Where, however, any appearances of fraud are detected, in such a case the Court will not interfere. Thus, in the case of Anthony Barlow, another master of a coasting vessel, the Court refused even a rule to show cause why he should not be

[1] 13 East's Reports, 550. note.

brought up by habeas corpus to be discharged from H. M. S. Enchantress, whither he had been taken after his impressment. He was sworn to be master of the Active, of fifty-two tons, navigating between Poole and Bristol; but the Court, finding that his father was acting as mate on board the same vessel, the owner of which was on shore, and that there was also another person on board, thought the appointment of Anthony Barrow as master was fraudulently contrived with a view to protection, by changing situations between the father and the son: the father being probably otherwise exempted, or less likely from age to be impressed. The Court, therefore, refused to interfere.[1]

A freeholder, as such, is not exempted from impressment. In 1760 a motion was made for a habeas corpus, directed to the captain of H. M. S. Princess Royal, to bring up Richard Good to the bar of the Court of King's Bench; he having been impressed as a mariner, and having made an affidavit, swearing that he was in custody, and that he had a freehold estate in possession of 26*l.* a year, and a copyhold estate of 20*l.* a year. But it not being sworn that Good was no sea-faring man, the Court required evidence on that point; whereupon Good made an affidavit, stating that he was merely a ship-carpenter, (*i. e.* a shipwright) and never used to go to sea: and on that ground the writ was awarded.[2] The Court did not on this occasion decide the question whether a freeholder as such had a legal claim to exemption, were he a sea-faring man or not. But this point subsequently arose in the case of one Douglas, who having been impressed while serving as mate of a merchantman, claimed his discharge on the ground that he was at the same time a freeholder to the annual value of 56*l.*; whereupon Lord Ellenborough and the whole Court of King's Bench unanimously ruled, that as Douglas was in other respects a fit subject for impressment, his character of a freeholder gave him no right of exemption.[3]

[1] 14 East's Reports, 346.

[2] Good's case, 1 Blackstone's Reports, 251.; Sopwith *v.* Wollaston, 2 Madand & Weobly's Remarkable Trials, 341.

[3] Rex *v.* Douglas, 5 East's Reports, 477.

A sea-going ship's carpenter, however, being one of the vessel's complement, is not exempt from impressment. This was decided in 1811, on an application for a habeas corpus, to be directed to the commander of H. M. S. Roebuck, to bring up the body of one Boggin, who had been impressed while serving as carpenter on board the Ceres, a collier of North Shields, then in Yarmouth Roads on her coasting voyage. But the Court decided against the claim, because, if a carpenter in the coal-trade were to be exempted on general grounds, the same exemption would apply to carpenters in every maritime trade.[1]

Freemen and liverymen of the city of London have claimed exemption in that character, but without success. One Young, a waterman and lighterman on the Thames, was impressed in 1808, and applied to the Court of King's Bench[2] for his discharge, on affidavits showing that he was a freeman and liveryman of London, by virtue of which he claimed exemption from impressment, under the charters of Edward II. and Edward III., confirmed by Parliament and by usage. He relied on the case of one Millarship, a freeman and liveryman of London, who, on being impressed in 1777, applied for a habeas corpus for his discharge on the ground of privilege, and, pending the inquiry, was discharged by the Admiralty. Another case was also mentioned, in which a similar application to the Court of Common Pleas, on behalf of another liveryman who had been impressed, was attended with a like result. But the Court held that the civic charters, upon which Young rested his privilege, seemed rather to refer to the exemption of the citizens in those times from being drawn by the king to serve as soldiers beyond the limits of the city, and refused Young's application for a habeas corpus; Lord Ellenborough saying, that there did not appear to be any foundation for the exemption claimed from a service, which this description of persons in every part of the country were equally bound to give in their avocation, for the defence of the realm, when necessity called for it.

In 1776, the bargemen of the corporation of London were

[1] Exparte Boggin, 13 East's Reports, 549.

[2] 9 East's Reports, 466.

held to have no privilege against impressment.[1] Lieutenant Tait, being empowered by warrant from the Admiralty in the usual form, pressed John Tubbs, a Thames waterman, who was at that time employed in navigating a ship in the Thames below Gravesend. Tubbs produced to the officer the following certificate:—"These are to certify, to all whom it may concern, that John Tubbs is duly admitted a waterman of the city of London, to attend upon the lord mayor and aldermen of the said city, when and as often as he shall be required; of which all persons empowered to impress men into His Majesty's service are desired to take notice; for that by such admission he is exempted from being impressed, or compelled to such service. Signed, W. Dawson, Waterbailiff." The lieutenant, notwithstanding this certificate, took Tubbs, and sent him on board H. M. S. Conquestadore, a guard-ship at the Nore. The corporation of London then applied to the Court of King's Bench for a habeas corpus to bring up Tubbs in order to his discharge; and in support of the motion, evidence was given, that there were thirty-one watermen belonging to the lord mayor, and bound to attendance upon him when required, according to the certificate; and that Tubbs was one. Four instances were produced, taken from the city books, of such waterman having been discharged after impressments; and several city watermen made affidavit, that their certificates had always been considered a sufficient protection against impressment. On the other hand, the secretary of the Admiralty made affidavit, that, in the instructions issued to officers employed in the impress service, it had never been the practice to exempt the lord mayor's watermen; and that they were not, by reason of their appointments, exempted from liability to impressment: that he had searched the books of the Admiralty, and could find only one of the four cases of discharge relied upon by the corporation; and in that case it appeared, from the official letters, that the discharge was a matter of favour, and that the impressed waterman had offered an able seaman to serve in his room. The Court held that every exemption must be sustained as matter of *right;* that the exemption of

[1] Rex v. Tubbs, Cowper's Reports, p. 512.

the city watermen was to be found in no statute or common-law book whatsoever; that in the present case there was insufficient evidence of the alleged usage in favour of such watermen; and consequently that the habeas corpus must be refused.

In 1793 the Court of King's Bench decided in the case of one Fox, who applied to be discharged from the custody of a press-gang, that a sea-faring man serving the office of head-borough in a country town was not thereby exempted from impressment. Fox contended that his civil office was one in which he was compellable to serve, and that he could not be also compellable to serve in an incompatible employment. But the Court declared that the right of pressing was founded on common law, and extended to all persons exercising employment similar to that in question; that every exemption on the score of right must depend upon an express statute: and that the only excepted case not resting on statute law was that of a ferryman, as already noticed. A habeas corpus for the discharge of Fox was therefore denied.[1]

There are, however, many exemptions created by statutes which are still in force.

The statute 5 Eliz. c. 5. s. 41. is in the following terms: "Be it enacted in favour of fishermen and mariners haunting the sea as fishermen or mariners, that none of them shall hereafter at any time be compelled against his or their will to serve as any soldiers upon the land, or upon the sea, otherwise than as a mariner, except it shall be to serve under any captain of some ship or vessel, for landing to do some special exploit, which mariners have used to do, or under any other person having authority to withstand any invasion of enemies, or to subdue any rebellion within the realm, and also, except all such persons as by tenure, lawful custom, or covenant, be or shall be otherwise bound to serve."

By the statute 13 Geo. 2. c. 17., for the encouragement of navigation and the sea-service, the following classes of persons are exempted by sect. 1. from all liability to impressment, viz. all persons above the age of fifty-five years; all persons under the age of eighteen years; and every foreigner, being a mariner, seaman, or landsman, serving in

[1] Fox's case, 5 Term Reports, p. 276.

any merchant ship, trading vessel, or privateer belonging to the subjects of the Crown of Great Britain.

The second section of the act is in these words: "And for the encouragement of able-bodied landsmen to betake themselves to the sea-service, be it further enacted by the authority aforesaid, that every person of what age soever he be, who shall use the sea, shall be freed and exempted from being impressed for the full space of two years, to be computed from the time of his first going to sea; and that every person, who, not having before used the sea, shall bind himself apprentice to serve at sea, shall be freed and exempted from being impressed for the full space of three years, to be computed from the time of his binding himself apprentice as aforesaid."

All persons within the act are entitled to certificates of protection from the Admiralty *gratis*.

By stat. 14 Geo. 3. c. 78., the watermen retained by insurance offices within the cities of London and Westminster, and the precincts thereof, for extinguishing fires, not exceeding thirty for each office, are free from being impressed or compelled to go to sea, or serve as mariners: their names and places of abode being registered and entered with the secretary or other officer of the Admiralty.

By the statute 26 Geo. 3. c. 50, s. 25., harpooners, line-managers, and boat-steerers in the Southern Whale Fishery, are exempted, without any restriction.

By the stat. 32 Geo. 3. c. 22. s. 5. it is enacted, that no harpooner, line-manager, or boat-steerer, belonging to any ship in the Greenland trade, and having his name and capacity inserted in a list to be delivered on oath by the owner of the ship to the collector of customs at the port of clearance, shall be impressed from such service: And every such person during the time of the year that he is not employed in the Greenland trade, may sail in the colliery trade on giving security to the commissioners of customs that he will proceed in the ship to the whale fishery of the next season: And every seaman or commander who, after the first day of February in any future year, should be entered to serve on board any ship intended to proceed on the said fishery in the ensuing season, and whose name should be inserted in a list to

be delivered as aforesaid, and who should have given like security, should be privileged and exempt from impressment from or out of the said service from such first day of February till after the expiration of the then next season for the fishery, and until the termination of the voyage home from thence and no longer. But the act goes on to provide that the protection thereby given shall extend only to six harpooners, six line-managers, and eighteen common seamen to a vessel of 400 tons, and so in proportion for any less tonnage.

The same act provides that all apprentices whose terms of apprenticeship expire during the voyage, shall be accounted apprentice for the whole voyage, and shall on the ship's return be mustered accordingly.

By the stat. 50 Geo. 3. c. 108. the masters of fishing vessels or boats employed in the *fisheries of this kingdom*, and the apprentices, mariners, and landsmen navigating or fishing therein, are exempted from being impressed into the royal navy, under the following limitations: —

First; every master who, or the owner of whose vessel, shall have, or shall, within six calendar months before applying to the Admiralty for protection, have had one or more apprentices under sixteen years of age, bound for five years in the business of a fisherman.

Second; every such apprentice, not exceeding eight for a vessel of fifty tons and upwards; and not exceeding seven for a vessel of thirty-five, and under fifty tons; and not exceeding six for a vessel of thirty and under thirty-five tons; and not exceeding four for a vessel under thirty tons. Such apprentices are exempt during the continuance of their apprenticeships and actual service thereunder, and until twenty years of age.

Thirdly; one mariner for every such fishing vessel of ten tons and upwards, besides the master and his apprentices, during the time such mariner shall be actually and truly employed in such service.

Fourthly; any landsman above eighteen and under thirty years of age actually serving in any such fishing vessel of ten tons and upwards, for the space of two years computed from his commencement of such service, and until the end of his current voyage.

The act goes on to direct that the Admiralty shall grant protections *gratis* to all such persons; and if impressed, the act requires that, on production of such protections, all commanding officers having such men under their care or custody shall release them forthwith.

By the same act (sect. 4.) it is enacted, that on the impressment of any person thereby protected (except in the case of an actual invasion of the realm or imminent danger thereof), if any commanding officer of a gang shall refuse to give effect to the protection, or to examine it when offered for his inspection, or shall detain it from the party entitled to the possession of it, or shall omit to discharge the party so protected: or if the commanding officer of any ship, on board of which such impressed party shall be carried, shall not, on production or tender to him of such protection, release the party, or in case such protection shall have been taken away, then, if on affidavit being made before a justice of the peace of the existence and continuance of such protection, and of the detention of it, and on such affidavit being tendered to the commanding officer of the ship, he do not forthwith discharge the man, or if such commanding officer of the ship take away or detain the protection; every person offending in any such cases shall forfeit and pay to the party impressed, if not an apprentice, and if an apprentice then to his master, the sum of 20*l.*, to be recoverable before any justice of the peace, and payable within twenty-four hours after the conviction of the offender. Such penalties, however, must be sued for within three calendar months from the commission of the offence.

The act does not deprive aggrieved parties of their ordinary right to bring a civil action for damages: but such actions must be brought within six calendar months next after the cause of action accrued: and if a verdict be given for the defendant, he is entitled to recover treble costs.

The act, however, expressly declares that no such protections shall operate "in case of an actual invasion of these kingdoms or imminent danger thereof."

(*To be continued.*)

ART. III.—THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW YORK.

[Second Notice.]

In our last Number[1] we made some progress in giving an account of the great effort of legislative reform, in which our American brethren of the States of New York have taken precedence of ourselves, from whom their laws are derived,—the Code of Civil Procedure. We proceed now to lay before our readers an outline, as detailed as our space allows, of the remainder of this important and valuable work. We had brought up our notice to the conclusion of those provisions of the New Code by which the distinction between the form of procedure at Common Law and in Equity is swept away, and the Courts, no longer restricted to the administration of one only of these branches of jurisprudence, are enabled by the same form of action to dispose of all the varied questions which, in the busy world of American life, must constantly be brought before them. These provisions are followed by a long series of clauses relating to the proceedings in execution of the judgment in civil actions, including those intended to insure the discovery of the property of the debtor; to the allowance of costs; and to various actions in particular cases; namely, actions to determine conflicting claims on real property (§§ 888—902.); actions respecting the foreclosure of mortgages (§§ 903—906.); actions for nuisance, waste, or trespass on real property, and on lands belonging to Indians (§§ 908—918.); actions for the partition of real property (§§ 920—973.); actions respecting corporations (§§ 974—988.); actions by or against executors, administrators, legatees, heirs, or devisees (§§ 989—1021.); actions on official securities, and for fines and forfeitures (§§ 1022—1032.); actions by and against certain public officers and public bodies (§§ 1033—1043.); actions to vacate charters and letters patent, and prevent the

[1] Vol. XII. pp. 366—398.

usurpation of an office or franchise (§§ 1044—1062.); and, lastly, actions in justices' courts. These provisions appear to be, for the most part, a consolidation, with various amendments, of provisions already forming part of the statute law of New York (see note to p. 378.); and might afford many valuable suggestions, if so great a revolution in our judicial system, as has been effected in New York, should be ever seriously contemplated in England. But, for the present, we must pass over, with this short notice, all but the last, which possesses the more interest for English ears from the similarity of the civil jurisdiction exercised by the justices' courts with that which has been recently called into operation in our county courts. We cite, then, the most important provisions relating to these courts.

"§ 1063. Parties in justices' courts may prosecute or defend in person or by attorney, and any person may act as attorney, except that the constable by whom the summons or jury process was served, cannot appear or act on the trial in behalf of either party. He may however act, in any other stage of the action, as agent or attorney for a party; and the authority of a person to act for another as attorney, may be oral or written, but, unless admitted by the adverse party, must be proved by the oath of the attorney or otherwise.

"§ 1064. Actions in justices' courts are commenced by summons, or by the voluntary appearance and pleadings of the parties without summons. In the latter case, the action is deemed commenced at the time of appearance.

"§ 1066. The summons must be addressed to the defendant by name, or if his name be unknown, by description of him, and must summon him to appear before the justice at his office in a town or ward, and at a time specified therein, to answer the complaint of the plaintiff, for a cause of action therein described in general terms, sufficient to apprise the defendant of the nature of the claim against him, and must state the amount for which the plaintiff will take judgment, if the defendant fail to appear and answer. It must be subscribed by the plaintiff, or by the justice before whom it is returnable." (Pp. 446—448.)

This summons is to be served by the constable of the county (§ 1968.).

"§ 1070. The parties are entitled to one hour in which to ap-

pear, after the time mentioned in the summons for appearance, but are not bound to remain longer than that time, unless both parties have appeared, and the justice, being present, is actually engaged in the trial of another action, or of a special proceeding. In such case, he may postpone the time of appearance until the close of such trial." (P. 451.)

In certain cases, specified in the Code (§ 1071.), an order to arrest the defendant may be endorsed on the summons, upon an affidavit by the defendant of his claim, and the giving of certain securities for payment of all costs awarded to the defendant, and all damages which he may sustain by reason of the arrest (§ 1072.).

" § 1082. A plaintiff who resides out of the state, before commencing his action, must file or deposit with the justice security approved by him, for the payment to the defendant of any judgment that may be recovered by him in the action.

" § 1084. The pleadings must take place at the time the summons is returned served, or at such other time, not exceeding five days thereafter, as the justice may appoint for the convenience of parties, and by their consent.

" § 1085. The pleadings in justices' courts are.

" 1. The complaint by the plaintiff, stating the cause of action.

" 2. The answer by the defendant, stating the grounds of the defence.

" 3. When the answer sets up a counter-claim, the reply by the plaintiff.

" § 1086. The pleadings may be oral, except when the title to real property is brought in question, or they may be in writing; if oral, the substance of them must be entered by the justice in his docket; if in writing, they must be filed in his office, and a reference to them made in the docket. They are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended.

" § 1087. The complaint must state, in a plain and direct manner, the facts constituting the cause of action.

" § 1088. The answer may contain a denial of any of the material facts stated in the complaint, which the defendant believes to be untrue, and also a statement, in a plain and direct manner, of any other facts, constituting a defence, or a counter-claim upon which an action might be brought by the defendant against the plaintiff in a justice's court.

" § 1089. When the answer contains a counter-claim, the plaintiff may reply, denying any of the material allegations relating thereto.

" § 1090. A statement in an answer or reply that the party has not sufficient knowledge or information in respect to a particular allegation in the previous pleading of the adverse party, to form a belief, is equivalent to a denial.

" § 1091. When the cause of action or counter-claim arises upon an account or instrument for the payment of money only, it is sufficient for the party to deliver the account or instrument to the court, and to state that there is due to him thereon, from the adverse party, a specified sum, which he claims to recover or set off. The court may, at the time of the pleading, require that such writing or account be exhibited to the inspection of the adverse party, with liberty to copy the same; or if not so exhibited, may prohibit its being afterwards given in evidence.

" § 1092. Every complaint, answer, or reply must be verified by the oath of the party pleading, or, if he be not present, by the oath of his agent or attorney, to the effect that he believes it to be true. The verification must be oral or in writing, in conformity with the pleading verified.

" § 1093. Every material allegation in a complaint, or relating to a counter-claim in an answer, not denied by the pleading of the adverse party, must, on the trial, be taken to be true, except that when a defendant, who has not been served with a copy of the complaint with the summons, fails to appear and answer, the plaintiff cannot recover without proving his case.

" § 1094. Either party may object to a pleading of his adversary, or to any part thereof, that it is not sufficiently explicit to enable him to understand it, or that it contains no cause of action or defence, although it be taken as true.

" If the court deem the objection well founded, it must order the pleading to be amended, and, if the party refuse to amend, the defective pleading must be disregarded.

" § 1095. A variance between the proof on the trial, and the allegations in a pleading, must be disregarded as immaterial, unless the court be satisfied that the adverse party has been misled to his prejudice thereby.

" § 1096. The pleadings may be amended at any time before the trial, or during the trial, or upon appeal, to supply any deficiency or omissions in the allegations or denial necessary to support the action or defence, when, by such amendment, substantial justice will be promoted. If the amendment be made

after the issue, and it be made to appear to the satisfaction of the court by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment must be granted. The court may also, in its discretion, require, as a condition of an amendment, the payment of costs to the adverse party, to be fixed by the court, not exceeding three dollars; but such payment cannot be required unless an adjournment is made necessary by the amendment; nor can an amendment be allowed after a witness is sworn on the trial, when an adjournment thereby will be made necessary." (Pp. 458—462.)

If the title to real property appears to be in question, the justice must dismiss the action with costs (§ 1190.), unless the complaint include other causes of action not affected by the question of title; in which case the action is to be served and tried in the same manner as if the question of title had not been raised (§ 1101.).

> " Important changes are made in relation to a jury trial in justices' courts.
>
> " 1. The demand of a jury trial must be made at the time issue is joined.
>
> " 2. The jury fees are increased to twenty-five cents each, for all who are summoned and attend, whether sworn or not, and must be deposited with the justice at the time a jury is demanded.
>
> " 3. The jury is drawn from a jury-box, and summoned as in the higher courts, and not left to be chosen by a constable, as heretofore, often to the great scandal of the institution.
>
> " 4. If, upon the attendance of a jury, the cause is adjourned, the jury fees for attendance must be paid by the party moving the adjournment, and they must again attend at the time to which the trial is adjourned.
>
> " These provisions, it is believed, will prove salutary in securing good juries, and in preventing the unnecessary call of juries in trifling cases. Provision is also made for determining the competency of a juror; and the causes of challenge, which are defined in the Code, apply to justices' courts as well as others." (P. 468.)

Judgment that the action be dismissed without prejudice to a new action may be entered with costs; by consent of

the plaintiff; or the failure to appear at the time of trial; or in case it is shown at the trial that the action is brought in a wrong county or town without giving security as required by § 1082 (1124.).

"§ 1115. When the defendant fails to appear and answer, judgment must be given for the plaintiff, as follows:—

"1. Where a copy of the complaint and account, or instrument, has been served personally with the summons, as prescribed in section 1069., judgment must be given without further evidence for the sum specified in the summons.

"2. In other cases the justice must hear the evidence of the plaintiff, and render judgment for such sum only as shall appear by the evidence to be just; but in no case to exceed the amount specified in the summons." (P. 472.)

"§ 1118. When the amount found due to either party exceeds the sum, for which the justice is authorised to enter judgment, such party may remit the excess, and judgment may be entered for the residue." (P. 473.)

but:—

"§ 1119. In an action arising on contract, when there is no counter-claim, if the plaintiff fail to recover judgment for an amount equal to that stated in his summons, he cannot recover costs." (P. 473.)

The last section is stated to be introduced to prevent plaintiffs from setting up claims for a larger amount than is really due *where* a course of action *exists;* and thus litigating a doubtful claim with the certainty that the costs must fall on the defendant; and also for the purpose of securing the defendant against the frauds practised under the present system, where the summons in all cases laid the plaintiff's damage at fifty dollars or under; and evidence has sometimes been given in the trial, if the defendant failed to appear, of an unexpected claim to which he had a good defence (note to § 1119.).

"§ 1120. If the defendant, at any time before the trial, offer in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued. But if he do not accept such offer before the trial, and fail to recover in the action a sum equal to the offer,

he cannot recover costs accrued after the offer: but costs must be adjudged against him, and, if he recover, deducted from his recovery. But the offer, and failure to accept it, cannot be given in evidence, to affect the recovery, otherwise than as to costs, as above provided." (P. 474.)

"§ 1123. Execution for the enforcement of a judgment in a justice's court, except it has been docketed in the county clerk's office, may be issued by the justice before whom the judgment was rendered, or by his successor in office, on the application of the party entitled thereto, at any time within five years from the entry of judgment." (P. 475.)

The last section, it appears, changes the existing law so as to "allow of execution to be issued in the justices' courts immediately after judgment, according to the practice of the higher courts: When," say the Commissioners, "a debt is justly due, and has been so adjudged by the Court, it seems a perversion of right still to extend the time for its collection" (note to § 1123.).

"§ 1124. The execution must be directed to a constable of the county, and subscribed by the justice by whom the judgment was rendered, or by his successor in office, and must bear date the day of its delivery to the officer to be executed. It must intelligibly refer to the judgment, by stating the names of the parties, and the name of the justice before whom, and of the county and town where, and the time when, it was rendered; the amount of the judgment; and, if less than the whole is due, the true amount due thereon. It must require the constable substantially as follows:—

"1. If it be a case where the defendant cannot be arrested, it must direct the officer to collect the amount of the judgment out of the personal property of the debtor, and to pay the same to the party entitled thereto.

"2. If it be a case where the defendant may be arrested, in addition to the foregoing, it must direct the officer, if sufficient property of the defendant liable to the execution cannot be found to satisfy the judgment, that he arrest the debtor, and commit him to the jail of the county, until he pay the judgment, or be discharged according to law.

"3. It must further, in all cases, direct the officer to make return of the execution, and a certificate thereon, showing the

manner in which he has executed the same, in sixty days from the time of his receipt thereof." (P. 475—476.)

"§ 1127. When an execution directs the arrest of the debtor for want of sufficient personal chattels, if there be not sufficient subject to levy known to the officer, or if upon demand by the officer of the debtor, he fail to produce sufficient property, the officer may without further delay arrest the defendant. When arrested, the defendant must be conveyed to the common jail of the county, and there be kept in custody until the execution with costs be paid, or he be discharged by due course of law.

"§ 1128. The debtor committed as provided in the last section, may be held in prison ten days: and if he be a person without a family, for which he provides, one day in addition, for every dollar over ten due on the execution; or, if he have a family for which he provides, one day in addition, for every two dollars over twenty due on the execution.

"§ 1129. The affidavit of an imprisoned debtor, that he has a family for which he provides, specifying by name one or more persons, members of such family, and the place of their residence, is sufficient evidence thereof, to authorise his discharge by the jailer.

"§ 1130. An execution may, at the request of the plaintiff, be renewed before the expiration of sixty days from the time of its issue, by the word 'renewed' written thereon, with the date thereof, and subscribed by the justice. Such renewal has the effect of an original issue; and may be repeated as often as may be necessary. If an execution be returned unsatisfied, another may be afterwards issued." (Pp. 477—478.)

"§ 1150. A justice may punish, as for a criminal contempt, persons guilty of the following acts, and no others:—

"1. Disorderly, contemptuous, or insolent behaviour toward the justice while holding the court, tending to interrupt the due course of a trial, or other judicial proceeding.

"2. A breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding.

"3. Wilful resistance in the presence of the justice, to the execution of a lawful order or process made or issued by him." (P. 487.)

A new scale of fees is proposed by the Commissioners, which they state to be few in number, but respectable in the amount of compensation for the average services required (see §§ 1156—1161.).

From the Justices Court an appeal lies to the Court of Common Pleas of the city of New York, if the judgment is given by a Justices' Court in that city; in other cases to the County Courts of the county where the judgment was rendered (§ 1192.); from which it seems that a further appeal will lie to the Superior Courts. (§ 1184.)

The interest attaching at the present time to the question of the propriety of giving the right of appeal in cases decided in the County Courts, induces us to insert at length the principal provisions relating to these appeals.

"§ 1193. The appellant must, within twenty days after the judgment, make, or cause to be made, an affidavit, stating the substance of the testimony and proceedings before the court below, and the grounds upon which the appeal is founded.

"§ 1194. A copy of the affidavit must, within the same time, be served on the respondent, if he be a resident of the city or county, or can be found therein, personally, or by leaving it at his residence with some person of suitable age and discretion, or if he be not a resident, on the attorney or agent, if any, who appeared for him on the trial, and is a resident of such city or county, with a notice, stating that the appellate appeals from the judgment, and that the appeal will be heard by the appellant court, at a time and place therein designated, not less than six nor more than twenty days thereafter; which time may be in or out of term. When the notice cannot be thus served, the service may be made on the justice.

"§ 1195. If the appellant desire a stay of execution of the judgment, he must give security as provided in the next section.

"§ 1196. The security must be a written undertaking, executed by one or more sufficient sureties, approved by the county judge, or by the court below, to the effect, that if judgment be rendered against the appellant, and execution thereon be returned unsatisfied, in whole or in part, the sureties will pay the amount unsatisfied.

"§ 1197. The delivery of the undertaking to the court below stays the issuing of execution; or if it have been issued, the service of a copy of the undertaking, certified by the court below, upon the officer holding the execution, stays further proceedings thereon." (Pp. 505, 506.)

"§ 1199. When the affidavit and notice of appeal have been served, the respondent may supply or correct material omissions or

mis-statements therein by an affidavit on his part, a copy of which must be served on the attorney, if any, who prosecutes the appeal, or if there be none, on the appellant, if to be found in the county, at least one day before the time for hearing the appeal.

"§ 1200. The appellate court must proceed to hear the appeal at the time and place mentioned in the notice, or at such other time as the court may appoint, and may decide the same upon the affidavits; or if they be contradictory or defective in material points, may order the court below to make a return of the testimony and proceedings before it, within ten days after the service of the order and affidavits, or of copies thereof.

"§ 1201. The court below must thereupon, within the ten days, make a return to the appellate court of the testimony, proceedings and judgment, and file the same, with the order and affidavits, in the appellate court, and may be compelled to do so by the appellate court. But a justice is not bound to make a return, unless the fee prescribed by the last section of this chapter be paid on service of the order.

"§ 1202. If the return be defective, the appellate court may direct a further or amended return, as often as may be necessary, and may compel a compliance with its order." (Pp. 507, 508.)

"§ 1205. If a return be made, the appeal may be brought to a hearing at a general term of the appellate court, upon a notice by either party, of not less than eight days. It must be placed upon the calendar and continue thereon without further notice, until finally disposed of; but if neither party bring it to a hearing before the end of the second term, the court must dismiss the appeal, unless it continue the same, by special order, for cause shown.

"§ 1206. The appeal, whether heard on the affidavits or return, must be heard on the original papers; and no copy thereof need be furnished for the use of the court.

"§ 1207. Upon the hearing of the appeal, the appellate court must give judgment upon the law and the facts, according to the justice of the case, without regard to technical errors or defects which do not affect the merits. In case of a reversal, the Court may allow another action for the same cause.

"§ 1208. To every judgment upon an appeal there must be annexed the affidavits or return on which it was heard, which must be filed with the clerk of the Court, and constitute the judgment roll." (Pp. 509, 510.)

"§ 1212. The following fees and costs, and no other, except fees of officers, are allowed on appeals: —

"To the appellant, on reversal, if upon affiadvits, ten dollars, if upon a return fifteen dollars.

"To the respondent, on affirmance, if upon affidavits, seven dollars, if upon a return, twelve dollars.

"To a justice of the peace, for his return one dollar.

"If the judgment appealed from be reversed in part, and affirmed as to the residue, the amount of costs allowed to either party, is such as the appellate court may award, not exceeding ten dollars.

"If the appeal be dismissed for want of prosecution, as provided by section 1205., no costs are allowed to either party." (Pp. 510, 511.)

We had intended to notice others of the provisions relating to appeals, which our space forces us to omit. For the same reason we must pass over the regulations relating to proceedings against joint debtors, heirs, legatees, devisees, or tenants holding under a judgment debtor,—with those relating to offers of compromise,—to the admission and inspection of writings,—and some other subjects included in the Thirteenth Title of the Second Part of the Code, with the exception, however, of one section, which is as follows:—

No counsel can be permitted to speak on the argument of any case more than *one hour*, without the special leave of the Court, granted *before* the argument begins (§ 1757.); a provision which is said to be conformable to the rule of the Supreme Courts of the United States lately adopted, substituting one hour for two.

We shall be curious to learn what is the practical operation of this rule, should it be adopted, and how far the suitors are satisfied with such an infringement on the liberty of speech allowed to their advocates.

The Third Part of the Code, which relates to a variety of special proceedings, must, for the same reason which has induced us to shorten our notice of the concluding portion of the Second Part, be subjected but to a brief analysis. It contains twelve titles, of these the first (§§ 1264—1363.) treats of the State, or, as they have hitherto been called, the Prerogative Writs, of *certiorari, mandamus, ad quod damnum,* and *habeas corpus*. For these the Commissioners, in con-

formity to a direction in the act by which they were appointed, propose to substitute the English appellations of the Writ of Review of inferior Jurisdictions, the Writ of Mandate, the Writ of Assessment of Damages, and the Writ of Deliverance from Imprisonment. Mr. Graham being, however, dissentient in the last case. (§ 1266.)

The second title relates to certain summary modes of proceeding for obtaining the confession of judgment, or the submission of a controversy for the decision of the Courts, without action (§§ 1364—1371.); for enforcing payment of moneys due on bonds, negotiable instruments, or the judgments of another State of the Union (§§ 1372—1383.); for the foreclosure of mortgages of real property (§§ 1384—1406.); and for obtaining possession of real property in case of forcible entry or detention, or of occupation by tenants in arrear for rent (§§ 1407—1428.). The third title relates to the modes of enforcing liens, on buildings (§§ 1431—1438.), on vessels and their cargoes (§§ 1439—1449.), and on things doing damage upon real property (§§ 1450—1463.). The fourth title contains a definition of contempts, and prescribes the mode of punishing them (§§ 1467—1483.). The fifth title provides for the making assessments for local improvements (§§ 1484—1493.), and the opening of private roads (§§ 1494—1502.). The sixth title contains provisions for the voluntary dissolution of bodies corporate (§§ 1503—1522.). The seventh title relates to the establishment of Courts of Conciliation. The eighth title deals with the subject of arbitrations (§§ 1543—1553.) The ninth title regulates the general form of proceedings in the Surrogates Courts (§§ 1554—1562.); the special form of proceeding where the surrogate is called upon to exercise custody over "idiots, lunatics, and other persons of unsound mind, or of persons who *in consequence of habitual drunkenness*, or for any other cause, are incapable of the proper care and management of their own property (§§ 1563—1589.); and, lastly, the mode of appealing from their decisions (§§ 1590—1594.). The tenth title treats of proceedings in cases of insolvency, — a description which appears to be applied to those whom we call bankrupts, as well as to those to whom

we confine the appellation of insolvents. It contains three subdivisions: the first, concerning the proceedings by an insolvent to discharge himself from imprisonment or execution (§§ 1595—1600.); the second, concerning the proceedings by which an insolvent may discharge himself from his debts (§§ 1601—1606.); the third, concerning the proceedings by which a creditor can close the affairs of an insolvent debtor (§§ 1607—1612.). The eleventh title relates to the admeasurement of dower (§§ 1613—1628.). Lastly, the twelfth title relates to the disposition of the real property of infants (§§ 1629—1641.); the mode of discovering whether a person on whose life an estate depends is alive or dead (§§ 1641—1646.); the collection and remission of fines and forfeitures (§§ 1647—1654); and appeals in special cases from the County to the Supreme Court (§§ 1655—1658.).

We could wish that it were possible to state more fully several of the provisions included under these titles. Those relating to insolvents strike us as particularly worthy of attention, from their apparent simplicity, when contrasted with the complex and lengthy arrangements of our own law. But as we are forced to make a selection of one only of this long array of subjects, we have selected that one which has the greatest novelty to our legal forms — the provisions relating to Courts of Conciliation. These courts, though new to our jurisprudence, and hitherto to that of New York, where, it may be observed, that Mr. Commissioner Graham is opposed to their introduction (Preface, vii.), have existed in France ever since 1790; and it appears, from official documents, cited in a note to § 354. of the Code, that in the year 1846, no fewer than 986,123 cases were brought before the magistrates for conciliation by a simple notice to appear, of which 74 per cent., or 726,556, were immediately settled by his care. The beneficial influence of these courts, as might be expected, is felt principally in the country. In the large towns, especially in Paris, where the justices of the peace have in general little knowledge of the persons who come before them, it is almost entirely lost.[1]

[1] Note to §. 1522. Citing Rogron, Les Codes Français Expliqués.

Warned by this example, the American commissioners recommend that the experiment should be begun with the Judges of the County Courts, in whose advice respecting their rights, the parties are likely to be disposed to confide, and whose influence might therefore have a great effect in bringing them to a settlement. The mode in which it is proposed that the system should be worked will be seen by the following extracts from the provisions relating to it: —

"§ 1523. A Court of Conciliation is held in each of the counties of this state. In the city and county of New York, it is held by the city judge of the city of New York; in every other county, it is held by the county judge.

"§ 1524. The Court may be held on any judicial day, wherever, in his county, the judge may happen to be.

"§ 1525. Any person claiming to have a cause of action against another, in any of the cases mentioned in section 1527., may serve on him a written notice, mentioning the alleged cause of action, and requiring him to appear in relation thereto, before the Court of Conciliation of the county, where the notice is served, at a specified time, not less than five days from the time of service.

"§ 1526. Such notice must be served in the manner prescribed for a summons in a civil action.

"§ 1527. The causes of action, of which this Court has cognisance, are libel, slander, malicious prosecution, breach of promise of marriage, assault, battery, false imprisonment, and personal violence of any kind.

"§ 1528. At the time specified in the notice, or at such other time as the hearing may be adjourned to by the Court, the parties appearing must be received by the judge, apart from all other persons, except as is provided in section 1537., and thereupon, it is the duty of the judge to hear the allegations and explanations of the parties, to inform them of their respective rights, and to endeavour to reconcile their differences.

"§ 1529. Parties may voluntarily appear before the Court, without notice, and such appearance is as effectual as if notice had been previously served.

"§ 1530. If a reconciliation be had, a memorandum thereof, stating the nature of the controversy, or alleged cause of action, the appearance of the parties, and the fact of the reconciliation, without specifying the terms thereof, unless it be agreed by the parties to specify them, must be entered in a book of records, to

be kept by the judge, and such entry must be signed by the respective parties. The reconciliation thus effected shall be the final determination of the matter in controversy.

" § 1531. If the parties agree to a judgment, in favour of one against the other, in settlement of their differences, the judge may make, at the foot of the entry of reconciliation, a memorandum stating the judgment agreed upon. A transcript of such memorandum, certified by the judge, may be filed in the office of the county clerk, and shall thereupon have the same effect, and may be enforced in the same manner as the judgment of a county court.

" § 1532. If, instead of a reconciliation, the terms of which are settled between the parties, they voluntarily submit their matters in difference to the Court, and agree to abide the judgment, or assent thereto, in the presence of the Court, such submission and agreement, or assent, must be entered in the book of records, and signed by the respective parties; and thereupon the judgment of the Court, made pursuant to the submission, shall have the same effect, and may be enforced in the same manner, as the judgment mentioned in section 1531.

" § 1533. If, after the service of the notice prescribed in section 1525., either party fail to appear, or if the parties appearing be not reconciled as mentioned in sections 1530 and 1531., or do not enter into the submission and agreement mentioned in section 1532., it is the duty of the judge to make an entry in his book of records, stating in a summary manner the nature of the charge, the notice given, the proof of service thereof, the failure to appear of either party, or the appearance of the parties and their failure to be reconciled.

" § 1534. The entries in such book of records, or certified copies thereof signed by the judge, are evidence of the facts therein stated; and it is the duty of the judge to give a transcript of the entries in any case, certified by him, from his records, to either party on request.

" § 1535. In any action hereafter brought for the recovery of damages, for a cause of action mentioned in section 1527., the plaintiff cannot recover costs, unless he produce at the trial the certified copy mentioned in the last section, and unless it thereby appear that the notice was duly served, and that he appeared pursuant thereto, or that both the parties appeared without notice, as mentioned in section 1529.

" The defendant cannot recover costs in such action, when it

appears that after service of the notice, he failed to appear pursuant thereto.

"§ 1536. If, however, the case be one requiring a provisional remedy, and of such urgency as not to justify the delay arising from a previous notice to appear before the Court of Conciliation, the action may be commenced without such appearance or notice, and if the plaintiff afterwards give the notice, and appear before the Court of Conciliation pursuant thereto, he may recover costs accruing subsequent to such appearance.

"§ 1537. When an infant or a woman is a party to a proceeding before the Court of Conciliation, such infant or woman may be attended by the guardian, or husband, of such party, or if there be none, then by some friend approved by the Court."

"§ 1540. It is the duty of the judge of the Court of Conciliation, so far as may be compatible with his duty as judge, to give to every person, who may ask it, advice respecting his differences with another.

"§ 1541. No party to any admission or declaration, made before the Court of Conciliation, is bound thereby or responsible therefor, in any other judicial proceeding whatever, except as provided in this title.

"§ 1542. No fee can be received by the judge for any services rendered in the Court of Conciliation."

It remains to notice the provisions proposed in respect to the fourth great division of the Code, — that relating to evidence, — a subject on which it is stated that Mr. Graham differs from his brother Commissioners (Preface, vii.). They are arranged under six titles, preceded by a preliminary head containing certain general definitions (§§ 1659—1676.) Of these titles: the first concerns the general principles of evidence (§§ 1677—1704.); the second relates to the kinds and degrees of evidence, and contains the rules by which it is determined what may be received as evidence (§§ 1705—1792.); the third relates to the production of evidence (§§ 1793—1851.); the fourth to its effect (§ 1852.); the fifth to the rights and duties of witnesses (§§ 1853—1858.); lastly, the sixth relates to evidence in particular cases, and contains also certain miscellaneous and general provisions (§§ 1859—1883.). No portion of the Code, so far as we have examined it, better deserves attention. Those who may be doubtful as to the

advantages of "gathering, digesting, reconciling, and arranging into one book, consisting of a series of propositions," and publishing, by authority, those doctrines of the law which, "if not written in statutes, are written in books, not handed down from memory through successive generations, as if there were no written language, but preserved in writing," — may, perhaps, by comparing the best English works on the Law of Evidence with the titles of the report of the New York Commissioners devoted to this subject, where the same rules of evidence to which we are accustomed in England, collected mainly from the same sources, have been subjected to this process, find reason to change their opinion.

If we regard the law as a difficult science, to be mastered, the saving of labour in acquiring its fundamental principles, a result arising mainly from the authoritative manner in which such a digest can speak, is no small recommendation of it. Mr. Phillips's work on Evidence extends to upwards of 700 large and rather closely printed octavo pages. The valuable work on the same subject recently produced by Mr. Pitt Taylor, and the well known work of Mr. Starkie, are still more voluminous. The digest proposed by the American Commissioners occupies, after deducting the space taken up by the notes, in which the reasons for some of the changes recommended by them are given, little more than eighty octavo pages, containing 28 lines to a page. And this because the propositions — which have, in the case of the text writer, to be educed from a comparison of many and often conflicting authorities, and supported by references to them and discussions of their effect — are here authoritatively laid down once for all as a guide to future decisions.

On the other hand, if we look on the Law as a branch of knowledge, concerning which it is important to diffuse, as widely as possible, among the community at large, accurate information, the increased facilities for so doing afforded by a well arranged and authoritative digest of it is strikingly exemplified by such an example as the present. Who but a lawyer reads our text-books upon the law of evidence? But we will venture to predict that if the proposed Code becomes law, scarcely a well educated American in New York will

be found who is not acquainted with its most important provisions upon this subject.

We cannot, while upon this topic, refrain from citing the excellent observations addressed a few years since by Count Real, who bore an eminent part in the revision of the French Codes, to a late eminent law reformer, Mr. William Sampson, of New York.

"Courage; persevere in the support of written reason, against precedents and vague traditions. If law had no foundation but precedents, all crimes and injuries would have remained unpunished, and unredressed from the creation, till this day. The first judgment must have been guided by reason. Has reason lost its power? Precedents have been made by lawyers as articles of faith by divines. But whatever respect I may entertain for religion, I have not the same reverence for the decision of judges. I do not believe that the march of the human mind is retrograde. * * * * *

"Do as we did, but do it better, profiting by our mistakes. Let four or five good heads be united in a commission, to frame in silence the project of a code. It is not so difficult a task. It is only to consult together, and to select. Do with your best authors as we did with ours, and principally with Pothier's treatise on Obligations, which we simply converted into articles of our code.

"This *project* once formed, submit it *disputationibus eorum*, and you come to a result. As long as nothing is written, nothing will be done; but you will gain something the moment you have a written text for the groundwork of your discussions, how imperfect soever it may be at first. Our code was far from being adopted as it was originally proposed in the entire. I doubt whether one hundred articles were preserved in the form in which they were presented. It will require ardent hearts, and cool heads, and resolved industry, for such a work. With these, I think, you will not fail of complete success." (Pp. 695, 696.)

We have stated that the rules of evidence comprised in the Code, are, for the most part, the same as those recognized by our own Courts of Law. Some important alterations are, however, recommended, of which the two most material are, —the wide extension given to the admission of evidence,— and the "permitting any witness who desires it, at his option, to make solemn affirmation or declaration that he will speak

the truth, the whole truth, and nothing but the truth, instead of taking an oath," the present law being, that an oath is to be administered, unless the witness declares that he has conscientious scruples against it. The provisions relating to the first of these changes, are as follows:—

"§ 1708. All persons, without exception, otherwise than as specified in the next two sections, who, having organs of sense, can perceive, and perceiving can make known their perceptions to others, may be witnesses. Therefore neither parties, nor other persons who have an interest in the event of an action or proceeding, are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief: although in every case the credibility of the witness may be drawn in question, as provided in section 1680.

"§ 1709. The following persons are not admissible: —

"1. Those who are of unsound mind at the time of their production for examination.

"2. Children under ten years of age, who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

"§ 1710. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined, as a witness, in the following cases: —

"1. A husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband, without his consent, nor can either, during the marriage or afterwards, be, without the consent of the other, examined, as to any communication made by one to the other during the marriage. But this exception does not apply to a civil action or proceeding, by one against the other, nor to a criminal action or proceeding, for a crime committed by one against the other:

"2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon, in the course of professional employment.

"3. A clergyman, or priest, cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character, in the course of discipline, enjoined by the church to which he belongs.

"4. A licensed physician or surgeon cannot, without the con-

sent of his patient, be examined, in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient.

"5. A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure.

"§ 1711. If a person offer himself as a witness, that is to be deemed a consent to the examination also, of a wife, husband, attorney, clergyman, physician, or surgeon, on the same subject, within the meaning of the first four subdivisions of the last section." (Pp.714—727.)

"The fundamental difference," say the Commissioners, "between this system of evidence and that in common use, consists in this,—that the former goes upon the principle of admission, the latter on the system of exclusion. * * * Let in all the light possible, we ask; not so the common law: exclude the light, it says, lest perchance it deceive you; unmindful, as it appears to us, that poor light is better than none."

Even as to the wisdom of retaining the four exclusions specified in § 1710., the Commissioners express a doubt. "The only exclusions," they remark, "which Mr. Livingston admits, are those of a lawyer and a confessor; the only one allowed by Mr. Bentham, is a confessor" (note to § 1710.).

It appears by the note to § 1708., that in New York, as in England, a gradual approach has been made to the system of treating admission as the rule, and exclusion as the exception. "The Code of 1848 abolished incompetency from mere interest, but left *parties* still incompetent as witnesses in their own favour."

In Connecticut the remaining portion of the rule of exclusion was abolished a year ago, and the parties admitted as witnesses for themselves. An interesting statement made by the Lieutenant-Governor of that State, as to the good effects of this change, will be found in the note already cited; as well as an opinion in its favour from Judge Wells, an eminent jurist, who presides over the District Court of the United States for the district of Missouri. A striking proof of the influence of the labours of the Law Amendment Society is supplied by the insertion in the same note, at length, of the Report published by that society in 1849 upon this

subject,[1] as containing a full investigation of the whole question.

The provision by which witnesses are left at liberty to make an affirmation or declaration instead of taking an oath, is accompanied by the following observations:—

"That many good men doubt the lawfulness of oaths, and that more are shocked at their frequency and the levity with which they are taken, are sufficient reasons for dispensing with them, wherever it can be done with safety. It appears to us safe to leave it optional with the witness whether to take the oath or make the declaration, even though he have no scruple whatever about the lawfulness of an oath. A bad man will avoid the oath if he chooses by feigning a scruple he does not feel: a good man does not need it as a sanction for the truth of his declaration. (Note to § 1877.)

With the above extract we must conclude our imperfect account of the first part of this great work. We have already briefly noticed the history of its origin and progress; but some further details with which we have been supplied, and for the accuracy of which we can answer, will, we think, be interesting to our readers. The plan of Law Reform, of which the present code is the expression, is not of very recent origin or of hasty growth. It was brought before the legislature of the state of New York by Mr. Dudley Field, subsequently named one of the Commissioners for carrying it into effect in 1842, in the form of three bills; one "for the more simple and speedy administration of justice in the Courts of Common Law;" a second, "For the more simple and speedy administration of justice in the Courts of Equity;" and the third, "To simplify indictments." These bills, together with an explanatory memoir by which they were accompanied, were printed in the same year by order of the legislature. Four years afterwards the legislative body undertook a revision of the constitution of the state, and on that occasion a remarkable provision was inserted for blending together *the legal and equitable jurisdiction of the Courts.* In 1847 Mr. Field proposed the method of realising completely

[1] 8 L. R. 353.

this object by abolishing the prescribed forms of Common Law actions, and providing one uniform course of procedure for the trial of all complaints, whether relating to matters of equitable or legal cognisance; and the legislature, acting on his suggestion, in naming commissioners to revise the practice of the Courts, of which Mr. Field was one, directed them "to provide for the abolition of the present forms of actions and pleading at Common Law, for a uniform course of proceeding in all cases, whether of equitable or legal cognisance, and for the abandonment of any form or proceeding not necessary to ascertain or preserve the rights of the parties." The Commissioners acted on these instructions. Early in 1848 they presented the first and most important part of their code, that which abolishes the distinction of actions and the separation of legal and equitable remedies, and prescribed all the rules of pleading. This portion of the code became law on the First of July, 1848, and has therefore now been in operation for more than two years, and, as we are assured, with the most complete success; that is to say, it has had the effect of insuring that the causes tried under it shall be decided upon their substantial merits.[1] Its provisions have since been adopted as the law of the States of Missouri and the new State of California; while in the State of Mississippi they have been applied to the Common Law Courts; and an amendment of the constitution, by which they will also become applicable to the Courts of Equity, has been submitted to the people; and we have reason to believe, that in several of the states steps have been taken for the introduction of the whole of this remarkable code. In the course of 1849 the Commissioners presented their second, third, and fourth reports, and in the spring of this year brought their duties to a close by presenting in their fifth and sixth reports the completed code, of which we have endeavoured to give some idea.

Of the merits of the execution of this remarkable performance, the extracts we have made will enable our readers to form some judgment for themselves. The Commissioners, with the diffidence natural to men conscious of the magnitude

[1] We hope to be able to give in a future number the opinions of some American judges on the working of the Code. — Ed.

of the task in which they have been engaged, bespeak "indulgence beforehand" "for the errors and imperfections which will doubtless be discovered in it." (Preface, p. viii.). It has not been our object to hunt out for these; but so far as our own observation has extended, we must certainly say that the performance does not appear to us to stand in need of the indulgence thus bespoken. Some few verbal inaccuracies have indeed struck us in looking through its pages; and there is, especially in the latter part of it, occasionally a use of the future tense, according to the custom of our own Acts of Parliament, in a manner at variance with the form of expression adopted in the greater part of the Code, which speaks — as all laws, in our opinion, ought to speak — as if the facts to which it applies were then present or past. For instance, in § 1646., it is declared that "an estate which *shall have* been recovered pursuant to this chapter, must be restored to the person from whom it *was* recovered, if it be established that he *is* living" — instead of saying an estate which *has been* recovered, &c.

These are, however, very small blemishes, most of which may probably be removed on the further revision of the proposed Code, necessary before it can become law. On the whole, we cannot but congratulate the Commissioners on the mode in which they have accomplished their gigantic task, and the Legislature of the State of New York on the choice they have made of the persons who were to undertake it, expressing at the same time our hopes that the example of what may be done in consolidating and arranging into a systematic code laws analogous to those existing in England may not be without its effect in inducing the mother country to follow the example of her enterprising offspring.

We may add, that the example of New York has not been entirely lost on some of our own dependencies in the Western World, and that the last evidence of this that we have received is a Bill which consolidates the Criminal Law of Canada into a Code of Laws. Thus it is that whether we look to the East or to the West — to foreign countries or to our colonial possessions — one spirit only is active, and the Amendment of the Law is the moving principle of the present age.

ART. IV.—THE USURY LAWS.

The Usury Laws and the Trade of lending Money to the Poor in Ireland. A Paper read before the Dublin Statistical Society, on the 18th February, 1850, by W. NEILSON HANCOCK, LL.D.

THE operation of bit-by-bit legislation on the Usury Laws has left them a most absurd spectacle to the world, and a nice morsel for believers to swallow, if believers there still be in that agreeable fiction, that the law of England is the perfection of reason. No contract is valid for the loan of money at the rate of more than five per cent. per annum, on landed security; every contract is valid for the loan of money on personal security, at any rate of interest, except in two cases; first, it must not be on a security of a bill of exchange or note of hand at a longer date than twelve months, and, secondly, the loan must be for a sum of not less than 10*l.* Why these exceptions? Reason refuses to give any answer.

With regard to the 10*l.* exception, it only applies to loans made without depositing a pledge. Borrow 5*l.* of a pawnbroker, if you can find one who will entrust you without a pawn, and he must not contract to receive more than five per cent.; but hand over your watch to him, and he may lawfully charge a great deal more; and thus the lender's rate of interest is graduated in the inverse proportion to his risk.

We have been treating our Usury Laws as the Abyssinians treat their oxen. We have been cutting rump steaks out of them without putting them to death. In both cases the poor creatures can only drag on a wretched existence, disgraceful to those who keep them in it, and ludicrous to all who do not reflect on the misery which ever accompanies outrages on the laws of nature, whether perpetrated by butchers or legislators.

That a country which has been for eight-and-fifty years in possession of Bentham's unanswerable "Defence of Usury," should still have a single remnant of those swathing-bands remaining which prevented the free development of its com-

mercial activity by fixing a price on the use of money, is one of those follies the possibility of which nothing but their actual existence would suffice to prove!

The very able paper which stands at the head of this notice has added to that store of facts which have proved, incontrovertibly, that restraints by law on rates of interest have always operated to the injury of the party whom it was their object to protect.

"Some persons have alleged that the rates of interest which pawnbrokers are allowed to charge are exorbitant. If this statement be true, the best remedy would be to leave the trade in money perfectly free, and then the competition of money-lenders would reduce the rate of discount, whether on deposits or on personal security, to the lowest possible amount. But there are two circumstances which indicate that this rate is not so excessive as it seems to be. First, the effects produced by the lower scale allowed to be charged in England and Scotland; secondly, the failure of the Monts de Pieté established in Ireland, for the purpose of lending on more favourable terms than pawnbrokers.

"In England and Scotland the pawnbrokers are not allowed to charge more than $\frac{1}{2}d.$ per calendar month for any sum under 2*s.* 6*d.* without any charge for the ticket. This makes the rate per cent. for the sums under 2*s.* 6*d.* from 20 to 40 per cent. lower than the rate allowed to be charged in Ireland.

	Ireland.	England and Scotland.		
Thus for 1*s.* 1*d.*	85	46	39	difference.
„ 1*s.* 2*d.*	71	43	28	„
„ 1*s.* 3*d.*	66	40	26	„
„ 1*s.* 4*d.*	62	37½	24½	„
„ 1*s.* 8*d.*	50	30	20	„
„ 2*s.* 0*d.*	41	25	16	„
„ 2*s.* 1*d.*	64	24	40	„
„ 2*s.* 6*d.*	53	20	33	„

The consequence of the restrictions in England and Scotland is that the regular pawnbrokers refuse the great majority of pawns under 2*s.* 6*d.*, comprising, we have seen, the largest class of Irish pawns. The demand for such loans, however, has created a set of unlicensed pawnbrokers, who systematically violate the law, and who are called in London "dollyshop-keepers," and in Glasgow "wee pawns." The trade carried on by these parties is limited by the odium attending their operations; the poor are consequently

charged much higher sums than they would be if there was free competition.

"It may be interesting to notice the manner in which these parties evade the law. The dollyshop-keepers nominally purchase the article from the borrower, with a tacit agreement that if the latter come back in a month or six weeks at farthest, he will get back his goods on paying the sum lent and a bonus. I have been informed by an intelligent gentleman, who had inquired into the matter, that there are in London more dollyshop-keepers than regular pawnbrokers. He estimated the former at 500, and the latter at 400.[1] I am informed by the same authority that in Glasgow the trade carried on by the "wee pawns" exceeds by one-half the entire trade transacted by all the licensed pawnbrokers, their number being 1,500. Some further information on this subject is contained in a paper[2] read before the Statistical Section of the British Association, at the meeting at Glasgow, by Mr. Henry John Porter[3]: — "There exists in Glasgow," he says, "a system of pawning quite new to me, and I believe wholly unknown in Ireland. These are called wee or little pawns. I regret to say that the evils of the system are neither wee nor little. The supposed advantages or inducements to pawn at these dealers are as follow: — 1. They give money on articles of less value than the licensed pawnbrokers will receive. 2. They give about 2*s.* 6*d.* on articles which at licensed pawnbrokers will produce but 2*s.*; this is 25 per cent. more on the deposits. 3. They are open earlier and later than the usual pawnbrokers. 4. There is one of these houses opened on the Sabbath, both for pawning and releasing, which is kept by a Jew in Gibson's Wynd, or Prince's Street. The manifest disadvantages are: — 1. That they give no tickets, and consequently there is no security. They pretend to effect a purchase of the article, and although the poor persons are under the impression that the article is still their own, yet in cases of dispute which come before the police authorities, these illegal pawnbrokers almost invariably contrive to prove that there have been *bonâ fide* purchase and sale of the article. 2. The time for redeeming these pawns is one month, instead of one year. 3. The

[1] Can this be correct, only 400 licensed pawnbrokers in London, while there are 1500 in Glasgow? Or, by London does Dr. Hancock mean the city of London?

[2] Published in the Journal of the Statistical Society of London, vol. iii. p. 302.

[3] *Not* the eminent statician of the Board of Trade.— Ed.

interest charged is 1*d.* per week for 1*s.*, or at the rate of 433 and one-third per cent. per annum!"

"Now it is very remarkable that it never occurred to Mr. Porter to inquire why the 'wee pawns' existed in Scotland and not in Ireland. Had he done so, he would have readily discovered that their existence in Scotland arose entirely from the state of the law there. This discovery would have shown him that both the advantages and disadvantages of wee pawns are the offspring of restrictive legislation. As to the alleged advantages: — 1st. They give money on articles of less value than the licensed pawnbrokers will receive; because the law does not allow the licensed pawnbroker in Scotland to charge on very small sums a rate of interest that will remunerate him, the rate being from twenty to forty per cent. lower than what is allowed to be charged in Ireland. 2nd. They give about 2*s.* 6*d.* on articles which at licensed pawnbrokers will produce but 2*s.* This arises from the act of parliament providing a scale of remuneration for pawnbrokers, which increases as the sum lent diminishes; thus, if a pawnbroker in Scotland lends on an article 2*s.* 6*d.*, he makes only twenty per cent.; 2*s.* 1*d.*, 24 per cent.; 2*s.*, 25 per cent.; 1*s.* 8*d.*, 30 per cent.; 1*s.* 4*d.*, 37½ per cent.; 1*s.* 3*d.*, 40 per cent.; 1*s.* 2*d.*, 43 per cent.; 1*s.* 1*d.*, 46 per cent. It is his interest, therefore, to lend as small a sum as possible on each article. He would lose 5 per cent. if he advanced 2*s.* 6*d.* instead of 2*s* on an article. As to the third alleged advantage, that the wee pawns are open earlier and later than the usual pawnbrokers, this arises entirely from the act of parliament which limits the hours of opening and closing pawn-offices. I have not looked what these limits are in England and Scotland; but in Ireland the taking of a pawn before ten and after seven o'clock from March to September, and before ten or after four o'clock from September till March, renders the pawnbroker liable to a penalty of 40*s.* In the same way, if a Jew opened a licensed pawn-office on Sunday, he would be liable to a penalty. It is not easy to perceive the policy of limiting the hours of pawnbrokers carrying on their business: the effect in Scotland is, as we see, to throw the business into the hands of irregular traders.

"Again, as to the alleged disadvantages. The wee pawns give no tickets, because the law inflicts a penalty on parties giving tickets who charge the rate of interest they charge. They are forced in like manner to pretend a sale, because if they received on pawn they would be liable to a penalty for charging the rate of interest they do charge. 2nd. The time for redeeming in the wee

pawns is a month and not a year, because the loans being in very small sums, at a very high rate of interest, on articles taken very near their full value, the pawnbroker would lose if he held them for any time. The third disadvantage, that the wee pawns charge 433½ per cent. per annum, affords one of the strongest arguments against the restriction which causes their existence, and, indeed, against usury laws in general. Thus, the legislative attempt to prevent the poor being charged more than from 20 to 40 per cent. produces, as a result, that the regular pawnbrokers do not lend small sums to them at all, and they have to borrow from wee pawns at 433 per cent., whilst in Ireland, where pawnbrokers are allowed to charge from 40 to 80 per cent. on similar sums, *wee pawns* have no existence. There is another restriction on the trade of pawnbroking, namely, the sum of 10*l.* to which the loans are limited. This forces the pawnbroker to adopt different methods of lending sums above that amount. These methods are attended with inconvenience and risk, which impose a proportionate burden on the borrower. The obvious remedy for the evils of *wee* pawns, dollyshops, and the other evils connected with the trade of pawnbroking, is to leave that trade perfectly free. Let borrower and lender make their own bargains. Let the law not interfere, except to enforce *bonâ fide* contracts, and to protect against fraud." (Pp. 5—7.)

Dr. Hancock's concluding observations are worthy of all attention: —

"The whole investigation of the facts with regard to pawnbroking, dollyshops, wee pawns, and Monts de Piété, teaches one important lesson — the folly of legislating on different principles for the poor and rich. The real remedy for the evils which Mr. Porter vainly attempted to cure by charitable interference (the establishments of *Monts de Piété*), is to establish the same freedom in lending small sums that has for some years existed with regard to large sums. The defenders of the present state of the usury laws can be reduced to a complete dilemma. For how stands the case? The merchants applied to parliament for a suspension of the usury laws, on the ground that these laws, instead of keeping down the rate of interest when any commercial crisis tended to raise it above the legal rate, really raised it much higher than it would have risen, compelling them to pay 20*l.* or 30*l.* per cent. where they need only have paid 8*l.* or 10*l.* per cent.

"Now, if this reasoning be correct, as all economists of the present day admit it to be, can anything be more cruel than to expose

the poor to the evils from which rich merchants have been relieved? But if the economists are mistaken, and the reasoning of the merchants unfounded, why is the suspension of the usury laws not repealed? Why are pawnbrokers and charitable loan funds allowed to violate the spirit of the usury laws, by charging far beyond the legal rate of interest on loans to the poor? In the commercial crisis of 1847, whilst the prime minister advised the bank directors not to charge less than 8 per cent. on loans on approved security to the rich merchants of London, the law made it illegal for any one to lend small sums to poor farmers to help them through the same crisis, at a higher rate than 6 per cent.[1] How were they to get money at 6 per cent. when the market rate of interest in London was 8 per cent.? When merchants were allowed to borrow at 8 per cent., why should farmers and the poor be prohibited from borrowing at the same rate?" (Pp. 10, 11.)

Surely, the late experience which land-owners have had, how mischievous to themselves was the limitation of the rate of interest on mortgages in the money pressure of 1847, will induce them not to resist that total repeal of the Usury Laws which no influence can much longer prevent.

Interest of money is divisible into two parts, distinct in principle the one from the other. One portion is paid strictly for the use of the money borrowed, and where the security given is so perfect as to exclude the possibility of risk, that is the only portion which the borrower ought to pay, and indeed the only portion which he does pay in the ordinary course of things; but as the demand for money varies, so will the amount vary which the borrower is willing to give for the use of it, and when borrowers are willing to give more than five per cent., offering at the same time a perfect security, it is obvious that if land-owners are prohibited by a law made for their own protection from exceeding that limit, the operation of the law must be to prevent them from borrowing at all, and to call in the loans which they had already taken up on mortgage. This occurred in 1847, to the great distress of the borrowers. The other portion, which goes to the composition of interest, is payment for risk; but who is to measure that risk? Certainly the law, which, by limiting interest, would

[1] In England five per cent.

seem to estimate all risks alike, cannot possibly offer a fair measure in any individual case, except in those where it so happens that the market value of the risk, added to the market value of the use of money, is within the prescribed limit; *i. e.* in England within five per cent. But as the use of money is sometimes worth five per cent., and even more, those who have not a perfect security to offer are then excluded from the lawful money market, and are obliged to deal with those who add two other items to their charge, that is to say, payment for the risk which the lender incurs by violating the law, and payment for the odium which he incurs by passing into a class of money traders who have been stigmatised with the name of Usurer. We strongly advise our friends the land-owners to suspend for a time their attempts to re-fasten upon our limbs the chains from which we have been relieved, and employ the interval in freeing their own from the thraldom of the usury laws. Let us observe, that the most conservative of conveyancers have declared against these laws, so far as the land is concerned: as evidence of this we may refer to the recent work of Mr. Brodie on Taxation, and to the evidence of Mr. Christie before the Conveyancing and Registration Commission.

ART. V. — TENANT-RIGHT IN IRELAND.

THE agitation in favour of Tenant-Right in Ireland is assuming a most formidable character. We have observed with pain the recent county meetings of Wexford, Kilkenny, and Monaghan, at which language of the wildest description has been used and vehemently applauded. The Council of the Irish Tenant League promises the tenant-farmers fixity of tenure, and a low valuation of rents, if they but subscribe 10,000*l.*, and return a few members to Parliament. This body no doubt contains many able and worthy men, as well as very many professional politicians, who use the cry of the day for their own purposes. And we do not wish further to

allude to the Tenant-League, except for the purpose of pointing out the entire distinction between their ideas of Tenant-Right and the existing Tenant-Right of Ulster. The League hopes to effect a general valuation of rents, and proposes that the tenant shall not be disturbed in his possession, so long as he pays the rent fixed by the valuator. The existing Tenant-Right of Ulster means nothing but entire compensation for improvements effected by the tenant. In this compensation no doubt there is a certain element of fixity of tenure, which we shall afterwards explain.

It is painful to witness such an organization for the accomplishment of ruinous impossibility, — such ignorance of economic laws. From the language lately used in Ireland it might be supposed that rent is the invention of some barbarous legislature, instead of being merely an incident of society and civilization. It is no doubt unnecessary for the information of many of our readers to detail the theory of rent, as first prominently brought forward by Ricardo; but we shall do so briefly, in order to explain the mistakes into which these economists of a false school are falling.

The three great agents of production are capital, labour, and the land. The use of each of the three, and consequently the consent of the owner or employer of each, is necessary to production. The reward of the capitalist for his advance is termed profit, — of the labourer for his work, wages, — of the landlord for the use of his land, rent. It is at once obvious that rent is the result of a species of monopoly; — it is the consequence of the land in the country being limited in extent, and capable of being appropriated. For if all could have as much valuable land as they desire there would be no rent. The true definition of rent then is this: "the price paid to the owner for the use of the natural powers of the soil." There is always some land in a country which pays no rent, because it is of such deficient fertility as only to repay the capital and labour expended upon it. Apparently this is seldom the case, for the inferior land is generally mixed throughout the good soils; and the same farmer who rents the good land obtains also the inferior. He pays a rent nominally for all the acres; but in reality calculated upon the number capable of repaying

more than the average rate of profit. Thus the remainder pays no rent.

What, then, regulates the rate of rent?—The same ordinary principle of supply and demand which regulates the rate of profit, and the rate of wages. If land be capable of returning much above the ordinary rate of profit to the farmer after paying the wages of the labourer, he will be willing to pay a high rent for it. If not, — he cannot do so, — and no legislative enactments can compel him. It is true that an extreme case may be supposed. If all the land of the country really belonged to the sovereign, it might be possible by maintaining large bodies of mercenary troops to extort even double the present rent from the occupying tenants of Great Britain and Ireland. But this would not be rent, but taxation. It is probable even from the expenses of collection, that the net sum received would not be equal to the present rent. This sum would be paid from the capital of the tenants; and in a few years the fund whence this forced supply was drawn would be exhausted.

Now, some persons imagine that the reckless mismanagement and rackrenting of certain estates in Ireland justify the plan of a systematic valuation of the rents throughout the empire. We will for a moment overlook the total impracticability of the scheme. Yet other proprietors squander and mismanage their property, cause miseries to themselves and their dependants; but the State is not called upon to interfere. One man throws away 100,000*l.* in supporting an opera for two seasons; another buries 100,000*l.* in a hole. Is the State called on to assume the guardianship of both fortunes, and to regulate the general rate of profit for the community. This is an impossible task for the State to perform. The law can never enforce wisdom in managing one's own, and beneficence in dealing with others. Such matters must be left to the discretion of individuals, to the progress of education, and to the results of an enlightened public opinion.

As the law now stands, a man holding a fee-simple estate may let it utterly run to waste: he may refuse to let it at all, or under conditions nearly impossible to be fulfilled. Should the law of the land permit this?—We answer that it is better

for the law to permit this in the few individual cases of folly and mismanagement, than to injure the entire community by constant intermeddling with private affairs.[1] All modern political science tends to the development of individual liberty, and teaches that all men, as far as possible, should be left alone, and allowed to follow their own interests as they please. Though in some cases ignorance, vice, or folly may cause proprietors to mismanage their property, yet on the whole the natural principles of self-interest under a just system of legislation, will induce the landlords, as a body, to manage their property so as to produce the greatest amount of rent. And all enlightened experience shows that the best rent is to be paid by an educated and prosperous tenantry.

Let us, then, consider the reasons which must actuate the politicians of the Tenant League in insisting upon a valuation of rents, as a panacea for Ireland. They assume that the present rents are above fair market prices; and that the tenants are oppressed by them. They also invariably assume that the valuators would estimate the future rents at a far lower rate than the present. Otherwise they are reduced to the absurdity that the tenant might be compelled to pay an impossible and ruinous rent. For it might so happen, that in some cases the valuator would fix on a far higher rent than the present. No doubt this assumption strongly exposes the true nature of their politics. They are tinged with the Communistic ideas of those who wish to live at the expense of others, — of those who desire the State to be "a being beneficent and inexhaustible, which should afford bread for all mouths, labour for all arms, capital for all enterprises, credit for all projects." To use the words of M. Bastiat — with them "L'Etat, c'est la grande fiction à travers laquelle tout le monde s'efforce de vivre aux depens de tout le monde." Tenants would hesitate at absolutely demanding a portion of their landlord's property. But under the name of valuation of rents, and fixity of tenure, legalised by the State, the robbery appears less plain.

[1] The extent to which Government can properly interfere is stated, antè, p. 28.— Ed.

But if the lowering of rents by a valuation is to be adopted by the State, for whose benefit is it to attempt such a scheme? The Tenant League replies,—for the protection of the poor, of the rash, and of the foolish, who are compelled by poverty, and misled by their simplicity to promise more than they are able fairly to pay. We have not yet been informed of the machinery by which landlords will be compelled to let their lands at a valuation rent. But we suppose the Tenant League will be content with declaring that nothing beyond the valuation rent can be legally recovered, and with enacting severe penalties against the infringement of such law. Yet if the proposed tenant be so poor that it is not safe to accept him as a tenant, at the highest rent which the law will allow, he cannot get land at that rate. If he could now under the present law procure land at that rate, he would give no higher. The tenant-farmers of Ireland have so much discretion. The tenant does get the land now at the higher rate, which he pays as an insurance-price, by reason of his insolvent circumstances, and on the chance that he may ultimately prove a defaulter. At that higher rate it is now his interest to procure it; otherwise he would not take the land. It is thus that he himself judges who has every motive to induce him to offer the lowest rent. But under the proposed law the legislature would say to him, "You shall not have the land; it would be ruinous for you to take it." Yet this dooms the tenant in most instances to the poor-house.

But perhaps it is for the protection of the foolish that the valuation of rents ought to be made by the legislator. We can only say that even if the judgment of the valuator were in every case superior to the judgment of individuals consulting their own interest, the exertions of the legislature must ever be ineffectual in protecting individuals from the consequences of their own foolish bargains. It would be well for such foolish persons if the State could undertake their entire management, and dispense on their part with prudence, judgment, economy, and industry,—if the State, in fact, were to cultivate their land, and dress their dinners for them. But the State has no such power. All the funds of the State are derived from heavy, difficult taxation. And all the machinery

of State stewards and valuators would entail additional burthens upon the necessaries of life.

To come to realities — the real result of a legal low valuation of rents, would be to raise the rents actually paid. The law would be evaded in a thousand ways, as the usury laws were and are evaded. The price of land can no more be fixed than the price of money. But as the landlord would be exposed to some risk in case of detection, the tenant would be obliged to pay an insurance price to compensate the landlord for that risk. For although it be impossible to bring prices below the natural market value, evil laws and restrictions may artificially raise them beyond it. The consequence then of a valuation of rents would be, that if the rents were valued at a higher rate than the natural value, the law would be wholly inoperative, for the tenants could not be compelled to pay it; — and if the rents were valued at a lower rate than the natural value, the law, if enforced, would prevent the land from being occupied by those tenants who now pay the natural rent, or if not capable of being enforced, the tenants, in addition to the rent which they now pay, would also pay to the landlord an insurance price, to compensate him for the risk of being detected in receiving a higher rent than that authorized by law. For all attempts to regulate prices by law must be in vain. The usury laws only raised the rate of interest to borrowers. Under the first French Revolution the Government decreed that provisions should be sold at certain low prices. Paris was nearly starved, — the farmers refusing to bring corn and meat to market. For the State may forcibly rob a man of his property, but cannot persuade him to part with it except at his own price.

The fixity of tenure proposed by the League, is that the tenant should not be disturbed in his possession so long as he pays the valuation rent. This, in plain language, is the proposed confiscation of existing property into the hands of the present occupiers, leaving the landlords rent-chargers on the soil. This, in plain language, is the proposed confiscation of existing property into the hands of the occupying tenants; and we need not further discuss the proposition.

Far different from all this is the tenant-right of Ulster.

This custom was first brought prominently before the notice of the English public by the Report of Lord Devon's commission in 1845. As understood in Ulster, it comprises two things,—the right of the tenant to continue in possession until for non-payment of rent, or some other good reason, the landlord may eject him; and the right of the tenant, *subject to the approbation of the landlord,* to sell or leave to his heir or personal representative all the interest in the farm recognised by custom to belong to him.

There have been various accounts given of the historical origin of tenant-right. It seems not to have existed before the plantation of Ulster by James I. Many wealthy families in the north of Ireland still retain the lands then granted to their ancestors. Most of the patentees were soldiers, and few of them were wealthy enough to build the houses and stockades, which by the terms of their grants they were usually obliged to build. The yeomen whom they brought over, it may be presumed, built the houses and fenced the lands at their own expense, contrary to the practice in England, where landlords usually make the permanent improvements, and charge an increased rent accordingly. So tenant-right originated in the North as the compensation for the tenant's improvements. And after having been originally confined to the lands occupied by the Protestant settlers it has extended to most part of the province of Ulster. The Commissioners stated as to the value of the tenant-right: "We found that in various parts of Ulster sums equal to ten, twelve, or fifteen years' purchase upon the rent are commonly given for the tenant-right; and this not only where the rent is considered low, *but where it is fully equal to the value.*"

It may be perceived from this statement how much the custom of tenant-right increases the value of the land. Rents in Ulster are as high as in any other part of Ireland; and in 1845 estates commonly sold there at from twenty-five to thirty years' purchase; so that in some places where tenant-right existed, the entire value of the land would be forty or forty-five years' purchase of the rent.

The advantages of this tenant-right are obvious. The tenant is secure in the possession of his farm, or in the com-

pensation for his improvements, and so freely expends his capital and labour upon it. He knows he will be compensated for the value of his improvements at the expiration of his tenancy. Every farmer possessing his tenant-right has a stake in the country. And there is not a more peaceable, orderly, and thriving rural population than in the counties of Down, Armagh, and Antrim, wherever the tenant-right is respected.

On the other hand, the advantages to the landlord are, the complete security for the arrears of rent which may be due when the tenant leaves, and the power of selecting the new tenant on a change of tenancy. Thus, before the Landlord and Tenant Commissioners, Mr. John Hancock, agent to Lord Lurgan, stated, "If a tenant at will feels himself unable to hold and pay, he sells his tenant-right, and the rent and costs are always paid out of the first of the purchase-money." And Mr. Blacker, agent to Lord Gosford, stated, "By means of tenant-right I do not think there is a loss of five pounds by arrears in twenty years." So with these great advantages to the tenant, the advantages to the landlord are equally great. The one receives the usual rent without danger of arrears being unpaid; the other works cheerfully, conscious that another will not reap the fruits of his labours.

The advantages, then, of the tenant-right of Ulster being so tried and proved, it remains for us as jurists to consider, first, is this custom deserving of being legalised; and, next, in what manner it may be legalised. It is necessary to consider briefly the origin of property and the original titles to it, and to explain why the improved value created by the tenant's labour has not been recognised by the law of England to be the property of the tenant. Now, property is a right conferred and protected by the law of deriving certain advantages from the thing said to belong to a person in consequence of the legal relations in which he stands towards it. One of the first points to be learned connected with property is, that it exists entirely by force of and through means of the law. Property is the creature of law.

Man is not, like the brutes that live upon the earth in a state of nature, destined merely to consume the earth's spon-

taneous fruits. His mission here is to unite knowledge to nature. By labour he obtains abundance, and this affords rest from daily cares to some who then cultivate the useful arts, the advanced sciences, and produce exalted civilisation. But if man be destined to labour, to earn his bread by the sweat of his brow, his reward is the enjoyment of the fruits of that labour, and upon the security for that enjoyment does the progress of civilisation and society depend. Man has the right to take possession of those natural gifts of which he has need; but at the same time he is bound to respect the same rights in others, and to abstain from seizing things already occupied by others. Where this duty is enforced property already exists; and thus one of the primary titles to property is occupancy.

Bentham thus gives the reasons for establishing the property of a thing in the first occupant: first, because he is thereby spared the pain of disappointment — that pain which he would feel at finding himself deprived of the thing which he had occupied before all others; and this suffering to him would, *cæteris paribus*, be a greater suffering to him than the pleasure derived from the acquisition would be a pleasure to others; secondly, the bestowal of property upon the first occupant prevents the contests which might otherwise arise between him and several successive claimants; thirdly, the good which is secured to him acting in the character of a reward becomes a spur to the industry of others, who are led to seek for themselves similar advantages; and the increase of the general wealth is the result of these acquisitions.

In time other species of property arise; man adds to the value of the gifts of nature by labour. The earth was void and covered with thorns, — labour has made it fertile. Man from the shapeless mass of concealed riches in the earth, wrought the precious metals, produced the abundant harvests. Industrious labour has conquered the soil on which we live; by this we have made the earth habitable by civilised men. Labour is then the second in point of time of the primary titles to property, for occupancy must have preceded it; yet withal it is the principal, inasmuch as it has increased the value of all material property in the most wonderful manner from the

original rudeness of savage life. The right of property arising from labour is fully as well founded as that arising from occupancy, and for precisely the same reasons as above quoted from Bentham.

Locke has described the origin of property in a manner slightly differing from the above. According to him, things originally common became the property of the first occupant, not by that tacit agreement to which Grotius refers, but by virtue of the occupant's mixing with them the labour of his body which is his own, and thus making the things themselves his own. We need not, however, embarrass ourselves with very minute distinctions; it is conceded by all jurists that occupancy and the bestowing of labour in themselves should create property recognised by law.

Now, labour may be expended upon things already belonging to the labourer, or upon things belonging to another person. All jurists have ever allowed that labour expended upon a person's own property gives his title increased force. My lands reclaimed by me, those cultivated crops growing on them through my labour, if it would have been an injury to deprive me of them before, how much more is it now since each effort of my industry has given to these objects a new value? But the question arises, if any one has applied his labour to a thing which belongs to another with the tacit consent of the other, and without having been remunerated for his labour, to whom should the increased value of the property belong? This is the entire tenant-right question.

The rule of the Civil Law with respect to improvements made by the cultivator, not being the owner, was this, that the cultivator on being evicted was entitled to be reimbursed the entire value of the beneficial improvements effected by him. It is true the case did not then arise of free tenant cultivators requiring to be reimbursed the value of their improvements. There were then no free-tenant cultivators. In fact, the words landlord and tenant, in the modern acceptation of the term, do not occur in either of the Greek or Latin languages. This arose from the prevalence of slavery. And it is plain that where the cultivators are slaves no general system of renting lands can ever exist. The idea of

renting lands for agricultural purposes does not appear to have occurred to the Romans at all, except in the case of the contract of emphyteusis, which was rather in the nature of a grant in fee, subject to a perpetual rent-charge. An emphyteusis was properly perpetual; but in later times might have been granted for a long term of years. Proprietors then cultivated their own lands by slaves. And rent makes its appearance in Europe progressively with the abolition of slavery.

However, under the Civil Law, this question did arise in the case of the occupant of land cultivating it, and the owner afterwards evicting him. The rule in such cases was, that before assuming possession of the land the owner was bound to reimburse the occupier the value of the beneficial improvements.

The Roman law with respect to political institutions and public liberty is very inferior to the Common Law of England; but in all that regards contract and property it is one of the greatest monuments of human wisdom. To use the words of Chancellor Kent, "It was created and matured on the banks of the Tiber by the successive wisdom of Roman magistrates, statesmen, and sages; and after governing the greatest people in the world for thirteen or fourteen centuries, and undergoing extraordinary vicissitudes on the fall of the western Empire, it was revived, admired, and studied in modern Europe on account of the variety and excellence of its principles. It is now taught and obeyed, except in the instances where the feudal law has overcome it, in France, Germany, Holland, and Scotland; in the islands of the Indian ocean, on the banks of the Mississippi and St. Lawrence. So true it is, in the words of D'Aguesseau, 'the grand destinies of Rome are not yet fulfilled. She reigns through the world by her reason after having ceased to reign by her authority.'"

With respect to the use that may be made of the Civil Law in considering principles to be decided in our Courts of Justice we may quote the judgment of Tindal, C. J., in Acton *v.* Burnel.[1] "The Roman law furnishes no rule binding in itself upon the subjects of these realms; but in

[1] 12 M. & W. 324.

deciding a case upon a principle where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries of Europe."

The rule of the Civil Law in this respect was that a *bonâ fide* possessor making improvements without notice was entitled before being evicted to be reimbursed for them, so far as they augmented the property in value. This rule was founded on the equitable principle, *jure naturæ æquum est neminem alterius detrimento et injuriâ fieri locupletiorem.*[1] The occupant was also allowed to withdraw from the land the materials by which it was improved. This is exactly opposed to the principle of the feudal law, by which all fixtures and all improvements on the land became the sole property of the owner in fee.

Scattered, however, through our reports are many cases, many dicta of our judges, which show that they would have been anxious to modify the rigour of the feudal rule, and adopt the principle of the Civil Law, were it not that the maxim *quicquid plantatur solo solo cedit*, had been implanted in the foundations of our law of real property too deeply to be shaken. Thus in the East India Company *v.* Vincent[2], Lord Hardwicke said, "There are several instances where a man has suffered another to go on with building upon his ground and not set up a right title afterwards, when he was all the time conusant of his right, and the person building had no notice of the other's right; in which case the court would oblige the owner of the ground to permit the person building to enjoy it quietly, and without disturbance."

In Dormer *v.* Fortescue[3] there is a dictum of Lord Hardwicke which seems to say, that if the owner resort to Chancery for the recovery of the mesne profits, the *bonâ fide* possessor would be entitled to deduct the amount of his expenses for lasting and valuable improvements from the amount to be paid by way of damages for the rent and profits. So in

[1] Digest, 17. 50. 206. [2] 2 Atk. 83. [3] 3 Atk. 134.

Stiles *v.* Cowper[1], the land had been leased for sixty-one years on a building lease by Sir John Cowper. The tenant had laid out 3000*l.* in building, and paid the reserved rent up to 1729, when Sir John Cowper died. On his death, the defendant, who was his eldest son, became entitled as first remainderman. From the year 1729 to 1735 the defendant thought proper to receive the rent from Mr. Stiles, and during that time the tenant, at his own expense, built new offices. The defendant then brought an ejectment, and recovered at law for want of the usual covenants in building leases. Lord Hardwicke said, "When the remainderman lies by, and suffers the lessee or assignee to rebuild, and does not by his answer deny that he had notice of it, all these circumstances together will bind him from controverting the lease afterwards." A new lease was decreed to be executed with proper covenants, and the plaintiff to hold the premises for the remainder of the term. Here the Lord Chancellor grounded the equity upon the landlord tacitly permitting the tenant to rebuild. And it would not be stretching this equitable doctrine very far if a court of equity were to hold that a landlord permitting his tenant to build were bound to give him fair compensation upon the expiration of the term.

In Shannon *v.* Bradstreet[2], Lord Redesdale held that when the remainderman lay by and suffered the tenant to lay out money without giving him notice of his intention to impeach his title, it was ground of relief against him. So in Jackson *v.* Cator[3], an injunction was granted to restrain the landlord from cutting ornamental trees in a lawn during the term upon his consent to the tenant's plan of improvement, laying out the lawn, &c. And in The King *v.* The Inhabitants of Butterton, Lawrence J. said, "I remember a case some years ago, in which Lord Mansfield would not suffer a man to recover even in ejectment where he had stood by and seen the defendant build on his land." And there are many other cases relating to the implied assent which a person gives by standing by and seeing acts done by his tenant and the like without objection.[4]

[1] 3 Atk. 692. [2] 1 Sch. & Lef. 73. [3] 5 Ves. 688.

[4] Hunning *v.* Ferrers, Gilb. Eq. 85.; Attorney-General *v.* Baliol College, 9 Mod. 11.; Kenney *v.* Brown, 3 Ridg. 518.

Still, these cases apply only to an occupant without notice improving the land with knowledge of the owner, or else to a tenant holding by lease. And they have been decided on the principle *qui tacit consentire videtur*. Even in equity, no tenant from year to year is entitled to be recompensed for his expenditure, although with the knowledge of the landlord, unless he can clearly show that it was with reference to some agreement.

In Dann *v.* Spinner[1], Lord Eldon says, "I fully subscribe to the doctrine of the cases that have been cited, that this court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement; a lessor knowing and permitting these acts which the lessee would not have done, and the other must conceive he would not have done, but upon an expectation that the lessor would not throw an objection in the way of his enjoyment. Still it must be put upon the party to prove by strong and cogent evidence, leaving no reasonable doubt, that he acted upon that sort of encouragement."

It is to be remarked that the English judges in modern times have constantly endeavoured to modify the strict rule of the Common Law with respect to tenant's improvements. The law of fixtures illustrates this. Fixtures, or things of an accessory character annexed to houses or lands, originally all became the property of the landlord on the determination of the tenancy. The first case which recognises the right of a tenant to remove fixtures is in the Year Book, 20 Hen. 7. p. 13., in which the court laid down the following proposition: — "If a lessee for years sets up such a furnace [a furnace fixed to the freehold with mortar], or a dyer makes his vats and vessels to occupy his occupation, during the term he may remove them." In Poole's case[2], a soap-boiler, an under tenant, for the convenience of his trade, had put up certain vats, coppers, &c., all which things had been taken under an execution against him. On which account the first

[1] 7 Ves. 235

[2] 1 Salk. 368.

lessee brought an action against the sheriff for the damage occasioned to the house, and which he was liable to make good. Lord Holt, C. J., held that during the term, the soap-boiler might well remove the vats he set up in relation to trade; and he said, moreover, that he might do it by the Common Law (and not by virtue of any special custom) in favour of trade, and to encourage industry.

From that decision the right of the tenant to take away house fixtures has been established. Lord Ellenborough said, in Elwes *v.* Mawe[1], that this exception is founded on the principle of trade being a matter of a personal nature; whence it followed that an article which is used as an accessory to trade ought itself to be deemed personalty, and not a part of the freehold. But the public benefit may be regarded as the principal reason. Enlightened judges relaxed the strictness of the Common Law, "that the commercial interests of the country might be advanced by the encouragement given to tenants to employ their capital in making improvements for carrying on trade with the certainty of having the benefit of their expenditure secured to them at the expiration of these terms."

It has also been decided that a tenant may remove things affixed to the demised premises for the purposes of ornament. Gardeners and nurserymen also are entitled to sell and remove trees, shrubs, and the other produce of the grounds planted by them with an express view to sale, and this on the ground of their carrying on a species of trade.[2] But it has been held that a tenant not being a gardener is not at liberty to take away a bordering or edging of box planted by himself, nor even flowers.[3]

However, the leading case of Elwes *v.* Mawe[4], decides that the tenant in the case of agricultural fixtures is not entitled to the protection of the law, as in the case of fixtures for the purposes of trade. In this case, the defendant had occupied a farm under a twenty-one years' lease from the plaintiff. About fifteen years before the expiration of the lease, he had erected at his own expense a beast-house, a

[1] 3 East, 38.
[2] Empson *v.* Soden, 4 B. & Ad. 655.
[3] 2 East, 91.
[4] 3 East, 38.

carpenter's shop, a fuel-house, a cart-house, a pump-house, and fold-yard. Previous to the expiration of the lease, the defendant pulled down the buildings, dug up the foundation, and removed the materials, leaving the premises in the same situation as when he entered upon them. And his lessor now brought an action of waste against him for so doing. The question for the court was, whether he had a right to take away those buildings, and it was decided that he had no such right. The facts which led to the action do not appear in the report of the case. We may suppose that the tenant built either on a promise or with the expectation that his lease would be renewed; and on his landlord refusing to do so destroyed the buildings.

All this law, however, has but little application to Ireland, where there is a special clause of an act[1] making the removal of fixtures a misdemeanour.

In the United States of America, questions of this nature have arisen between the *squatters* who have settled on lands without title, and who cleared and cultivated them, — and the proprietors who afterwards have purchased the land from the government. The labour of these squatters, or others similarly circumstanced, has been allowed to create an interest in land termed Betterment; and which has been the subject of several legislative enactments and judicial decisions. In the Massachusetts' revised Statutes of 1835, it is provided that in the writ of entry upon disseisin for the recovery of any estate of freehold, that the tenant shall be entitled, in case of judgment against him, to compensation for the value of buildings or improvements made by him, or those under whom he claims, provided he or those under whom he claims had been in possession for six years before suit brought, or for a less time, if he held them under a title which he had reason to believe good. The amount is to be assessed by the jury on suggestion on record of the claim. The amount allowed may be set off against the rent and profits. The demandant may also require to have the value of the land without the improvements ascertained, and he may relinquish the land on being paid the price, and which the tenant must pay, or lose

[1] 9 Geo. 4. c. 56. s. 24.

the value of the improvements. Similar statutes have been passed in Maine, New Hampshire, Vermont, Virginia, Alabama, Ohio, and Illinois. It is true, some of the statutes have been declared by the Supreme Court of the United States to be unconstitutional. And the law is consequently in an unsettled state. The Americans, from their great abundance of fertile unoccupied land, can afford to let it remain so.

In New York, in the case of Murray *v.* Gouverneur [1], it was intimated by the Court that in the equitable action at law for the mesne profits, the defendant might have the value of his improvements deducted by way of set-off. This, however, was a mere dictum. And there is no case decided in England, Ireland, or the United States grounded upon common law principles, and declaring that the occupant of the land was, without any special contract, entitled to payment for his improvements as against the true owner when the latter was not guilty of fraud in concealing his title.

However, though there has been no decision to the effect that the occupant was entitled to the absolute payment by the owner of the value of the improvements, still, it has been decided in the United States that these considerations have afforded just ground for mitigation of damages in an action for the mesne profits, and the value of the permanent improvements made in good faith has been allowed to the extent of the rents and profits claimed by the plaintiff.[2] And one of the New York Statutes declares, that the settler on certain lands called the military lands, under colour of a *bonâ fide* purchase, should not be divested of his possession on recovery by the real owner, until the former had been paid the value of his improvements on the land, after deducting thereout a reasonable compensation to the owner for the use and occupation of the land. The validity of this statute has, however, been questioned.

But all the reasoning upon which the Civil Law gave the value of the beneficial improvements to the occupant in

[1] 2 Johnston's Cases, 441.

[2] Hylton *v.* Brown, C. C., April, 1808; Wharton's Dig. tit. Ejectment; Jackson *v.* Loomis, 4 Cowan's Rep. 168.; Ruffin, C. J., in Dowd *v.* Fawcett, 4 Dev. N. C. Rep. 95.

certain cases, — all the reasoning that has guided the enactment of the Betterment Statutes in the United States,— applies *à fortiori* to the case of tenants making improvements on the soil. It might have been said under the Civil Law, and with some appearance of justice, that the owner should not be compelled to reimburse the occupant for the value of improvements made without his knowledge, and when the occupant originally may have committed a tort in entering upon the land at all: it might have been said in the United States, why legalise the claims of these lawless squatters? Yet the jurists in both cases, in both countries, decided that labour gave the right to the property created by it, and they recognised the principle *jure naturæ æquum est neminem alterius detrimento et injuriâ fieri locupletiorem.*

The tenant, on the other hand, may well be supposed to make no improvements without his landlord's knowledge; and if the landlord consents to the tenant's investment of his capital and labour, he has no natural right to confiscate it. His present right in this country is derived from the feudal law, which belonged to a past age, and was instituted for the purpose of maintaining what here has long ceased to exist,— an hereditary military aristocracy.

We consider, then, that the Tenant-right custom now existing in Ulster should be legalised, and that, in the absence of agreement to the contrary, all the improvement effected by the tenant on the land should be his property. In these countries the sale of land in small portions is difficult—almost impossible—owing to the law of settlement, the difficulties of title, and all the embarrassments incident to our complicated system of the law of real property; but, were Tenant-right legalised,— not a chimæra of rent-valuation, but a recognition by the law of the property of the tenant in the improvements effected by him,— every tenant farmer in the country would be enabled to become a proprietor, and the money now squandered in intoxication by the labourer would be expended by him upon the land.

Mr. KAY, in his late work[1], ably characterises the difference

[1] The Social Condition and Education of the People in England and Europe.

between the conduct and habits of Irishmen in their own country and abroad. "In his own country, exposed to the wretched under-lessee system, and under-agent system of Ireland, to the discontented spirit of a priesthood which we have treated as if we desired to render it inimical to our government, to the galling sense of foreign rule suggested by the presence of English soldiers, and to the irritating thought that his rent goes to aggrandise the splendour of a distant capital, and that the hall of his landlord is deserted, the Irishman becomes discontented, idle, rebellious, criminal. Send him to Australia, to the States, or to any English colony, where he can make himself by industry a proprietor of land, and where he is not shackled by middle age legislation, and he becomes immediately the most energetic and conservative of colonists. He there acquires faster than any one else; he effects more in a day than any one else; he is more untiring in his perseverance than any one else; and he forces his rulers to write home to England — as the Governor of South Australia did but a few years ago — that the Irish are the most enterprising, successful, and orderly of all the colonists of those distant lands. Put the Irishman in the English army, or in the manufacturing districts of England, and similar results invariably follow. In the army he makes a first-rate soldier; while in Lancashire, where he is sure to earn as much as his day's labour is worth, where the galling misgovernment of his own country does not affect him, where he enjoys his property securely, and where he is put on a level with the English labourer, he at once becomes a formidable rival of the Englishman in every respect, and one of the most successful of the operatives. On the railway works of England the same result is visible; all showing that, as far as the Irish are concerned, they might be made, and would certainly become, the best of citizens, if they had only the best of institutions under which to live.".

It is impossible at once in these countries to reform the law of settlement, by which landed property is so tied up; by means of which it is accumulating in the hands of great proprietors, and by means of which the purchase of small portions

of land is so impeded. But, by a declaratory law on the subject of Tenant-right, every farmer in the land would within a few years be a proprietor. The property which they would so own is not now in existence. If no such law be passed, giving the labourer the fruits of his industry, that property will never come into existence; for men will not labour that others may grow rich at their expense. The tenant-farmers of Ireland, at present, take every crop out of the soil in the manner that yields an immediate return, but make no permanent improvements. Ireland is situated on the very high road of European commerce with America. Its harbours are some of the finest in the world. The fertility of its soil has won for it the name of the Emerald Isle. The Irish are distinguished for energy, industry, and prosperity in almost every part of the world except Ireland; but in Ireland half the population lives in mud cabins containing only one room. Thousands of acres are going out of cultivation. Irish history, in effect, at present is but a weekly record of evictions, cropliftings, agrarian outrages, and murders. Except in the north of Ireland, no tenant-farmer improves his land: if he drains and fences, the rent is raised; if he builds a house and offices, he receives a notice to quit, and the farm is let at a higher rent to a new tenant.

What does Ireland want to put an end to this wretched system? As to that we may quote Mr. Kay again: "Ireland requires a law which would enable the peasants, by industry, prudence, and economy, to acquire land; which would thus interest the peasantry in the support of the government, and in the preservation of social tranquillity; which would dissipate that helplessness and despair which now drives the fine peasantry of that noble island into disaffection and rebellion; which would make the Irish peasant as active and successful in Ireland, as he is throughout our colonies and the United States; which would induce him to settle on the waste lands at home, in order to cultivate them, instead of escaping to distant wilds to effect there what is so much wanted at home; and which would offer him the same inducements to exert himself, and to practise sobriety, economy, self-denial and industry, as present themselves to him as soon as he lands in

North America. And we want a law which would bring capital to the land and land to the capitalist."

But at once the objection is started, Why should not this law be enacted for England? and how have England and English agriculture flourished without it? Tenant-right does exist to some extent in the Eastern counties. But the question has not arisen to the same extent or with the same pressure in England, because here the landlords generally make all the improvements required by the progress of agriculture, and consequently they are entitled to charge whatever rent they please for the use of them. In Ireland, on the contrary, it is the general custom for the owner to make no improvements, whilst the cultivator occasionally does. Besides, England is not a fair criterion. The wealth of the world is centralised here. Capitalists, nabobs, colonial judges, all the Englishmen who seek wealth in every clime, return home in their old age, buy estates, and expend vast sums in agriculture. The wealth accumulated in the manufacturing towns is spread over the country in fertilising streams. Such is the industry and prosperity of England, that she can afford to live under the laws which injure her unfortunate sister.

How is Tenant-right to be legalised? Mr. Sharman Crawford, one of its most consistent and sensible advocates, proposes [1] that for the purpose of determining all disputed claims of Tenant-right, a court should be established in Dublin; that the tenants should appoint commissioners in every parish, and the landlord also; that the court in Dublin should also appoint umpires between them. But we do not see any reason for withdrawing this species of property, if recognised, from the ordinary laws of the country. Let the tenant have an action of assumpsit against the landlord, on the implied promise to compensate him for the unexhausted improvements on the expiration of the tenancy; and let the amount to be recovered be decided in the usual way, by that ancient and time-honoured tribunal — a jury. All the difficulty in this part of the case has arisen from the anxiety of persons to invent new forms of procedure, instead of being contented with those tried by experience, and found to be the

[1] Letter, Feb 12. 1850.

most satisfactory ever invented. No complicated intermeddling machinery of Government inspectors could satisfy either landlord or tenant. But we believe the same jury that decides the amount of damages to be recovered in actions for libel, slander, and crim. con., would be equal to the task of compensating the tenant for his improvements, with more satisfaction to both parties than any other possible tribunal.

We trust that this question will attract the notice of the Legislature during the ensuing session. The peace and prosperity of Ireland depend upon its equitable adjustment.

ART. VI.—THE COUNTY COURTS' EXTENSION ACT.

An Act to extend the Act for the more easy Recovery of small Debts and Demands in England, and to amend the same. 13 & 14 Vict. c. 61.

In our fifth volume[1] we gave a full account and summary of the provisions of the Act for the Establishment of County Courts, and we have ever since endeavoured to trace and record the progress of these institutions. No one will deny that this act has been attended with great benefit to the public, or that it has effected, and will probably still further effect, great changes in our legal procedure. It is certainly not a little remarkable that the Courts of Equity have in their new mode of pleading, under the name of Claims, already adopted something which looks very like the system of pleading pursued in the County Courts; and we have but little doubt that the Superior Courts of Common Law will, sooner or later, be greatly influenced by much of the practice which has prevailed in these inferior Courts. In fact, however hard it may be for the lawyer to admit it, yet he must come to the conclusion which has been practically established by the public, that these Courts give the suitor in most cases what he wants, JUSTICE WITHOUT ANY UNNECESSARY LEGAL TECHNICALITIES. This we apprehend, so far as it is attainable,

[1] 5 L. R. pp. 194—213.

is what the public now demands on all hands, and what the profession must concede. These Courts, it may be said, are now by the act of last session to enter upon a new sphere of existence. Not only is their jurisdiction extended to all debts, damages, and demands not exceeding the sum of 50*l.*, with some exceptions; but with the consent of the parties, matters not within their jurisdiction, and to any amount, may be brought before them (s. 17.). They are fairly again on their trial, and if they are found thus to answer the purposes of suitors, it will not only be impossible to prevent the preferential resort to them, but to avoid the adoption by other tribunals of a procedure which is found generally satisfactory. The principal provisions of this very important act ought to be stated in these pages, however familiar they may be to our readers; and we shall continue to watch over these new institutions with great interest and some anxiety. There is much in their procedure to admire. Still we could wish to see some greater controul than is now exercised over the great powers given to their judges. It will be impossible that they can conduct the great mass of business which must be thrown upon them, unaided by professional assistance, or that this assistance can be rendered to them without proper remuneration. We certainly hope, among other checks, to see a Permanent Bar established in all these Courts, which may assist the judges, and serve the purposes of the administration of justice. How this Bar should be formed is worthy of consideration. It may be difficult to give the barrister *præaudience*, and not altogether advisable; but without this we apprehend that the services of the Bar will not be secured. On the other hand, if attorneys are to be the advocates of these Courts, they will not usually be the most eminent of their class. It is obvious that an attorney of any practice could not afford to abandon all his other clients, and give his attendance for several hours in these Courts. The duty, therefore, in most cases would devolve on clerks, or on attorneys in small practice. It is therefore not so much a question between barrister and attorney as between barrister and attorney's clerk. We have been greatly pleased to see the vast improvement, as well moral as mental, in this last class of the profession; but

at present, until legal education shall be much more widely diffused, it cannot be doubted that the junior bar, as well from their previous education and discipline as from their legal acquirements, is to be preferred; the only doubt in the matter arising from the gross defects now chargeable upon the system, or want of system, pursued by the Inns of Court. This question of a Bar for the County Courts is an important one, as well for the public as the profession, and we think should not be regulated by the individual judges, whose opinions may conflict, and who are disagreeably placed in the matter; but should be determined by some higher authority after full debate.

We would also say a word as to the salaries of the judges and the clerks of these Courts. Power is given by the new act (s. 7.) to pay these officers by salaries instead of by fees. We could have wished that power had been given to the Treasury to increase their salaries. We are far from wishing to see professional services overpaid or extravagantly rated; but looking at the proprieties of life, and the expenses which are almost a matter of necessity in this country, we do not think 1000*l.* a-year to the judge, and 600*l.* a-year to the clerk, are sufficient. It is quite possible that there may be no difficulty in filling these situations at these salaries, and with proper men; but this is not taking into consideration the entire view of the subject; for if the station is not properly maintained, and the families of the officers of the Court not reasonably well provided for, it will be difficult, especially in this country, to prevent some reflection being cast on the administration of justice. It has been said, by an eminent political economist, that a carriage is a necessity to a lady of fashion resident in London: we may, perhaps, say that a decent brougham is a *necessity* to a county-court judge, and a neat gig a *necessity* to a clerk. We doubt, however, whether the respective salaries of these officers of the Court would, independent of private means, which cannot be counted on, enable them always to keep these carriages. We hope that the friends of this important experiment, among whom are now to be counted the present Government and the *present* law. officers of the Crown, will take this small matter into

their consideration, and bring in a bill for the purpose. We apprehend that the Government is at present a gainer in its accounts with the County-Court Fund,—we mean that the receipts by fees exceed the advances made out of the Consolidated Fund. Now surely it was never intended that there should be a *profit* derived from this source. It is obvious, that if this be so, there must be a reduction of *fees;* but, considering the probable increase of business which is now likely to flow into these Courts, we conceive that this is the time when a small increase of salaries may properly be made; and we would suggest that the salary of the judge shall in future be 1200*l.*, and that of the clerk 800*l.*, per annum.

We shall now give our proposed summary of the act.

"By the first section it is enacted, that the jurisdiction of the several courts holden or to be holden under the said act shall extend to the recovery of any debt, damage, or demand, not exceeding the sum of 50*l.*, and to all actions in respect thereof (save and except the several actions specified in the proviso in sect. 58. of the same act.)

"By s. 2. this act is to be construed with 9 & 10 Vict. c. 95. and 12 & 13 Vict. c. 101.

"By s. 3. a deputy judge is not to practise in the district whilst he acts as deputy.[1] The clerks are to reside in the district.

"By s. 4. power is given to the Lord Chancellor to remove clerks, high bailiffs, or assistant clerks.

"By s. 5. fees are to be taken on proceedings according to schedule. Power is given to Secretary of State, with consent of the Treasury, to alter fees.

"By s. 6. the fees to be taken by barristers at law and attorneys shall be as follows:—An attorney shall be entitled to have or recover a sum not exceeding 1*l.* 10*s.* for his fees and costs, where the debt, damage, or demand claimed in any plaint in covenant, debt, detinue, or assumpsit shall not exceed 35*l.*, or 2*l.* in any other case, within the jurisdiction given by this act; and in no case shall any fee exceeding 2*l.* 4*s.* 6*d.* be allowed for employing a barrister as counsel in the cause. And the expense of employing a barrister or an attorney either by plaintiff or defendant shall not be allowed on taxation of costs, unless by order of the judge; and

[1] The effect of this clause will be, we apprehend, to call into existence a class, a limited one probably, who will confine their practice to undertaking these vicarial duties, *faute de mieux.*

the judges of the said courts respectively shall from time to time determine in what cases such expenses shall be so allowed.

"By s. 7. power of paying judges, clerks, and high bailiffs by salaries instead of fees is given to the Lords of the Treasury and Secretary of State.

"By s. 10. if plaintiff or his attorney do not appear on the day of hearing, costs may be awarded to defendant for his trouble and attendance. [This is a provision which might well be extended to the Superior Courts.]

"By s. 11. plaintiffs recovering in the Superior Courts sums not exceeding 20*l.* in actions of contract, or 5*l.* in actions of tort, over which the County Court has jurisdiction, are to have no costs; but by s. 12. judge at the trial may certify, to entitle the plaintiff to costs; and by s. 13. if the Court, or a judge at chambers, make an order, the plaintiff is to have costs. Whether there be a verdict in such action or not, if the plaintiff shall make it appear to the satisfaction of the Court in which such action was brought, or to the satisfaction of a judge at chambers upon summons, that the said action was brought for a cause in which concurrent jurisdiction is given to the Superior Courts by the hundred and twenty-eighth section of the said recited act of the tenth year of her Majesty, or for which no plaint could have been entered in any such County Court, or that the said cause was removed from a County Court by Certiorari, then and in any of such cases the Court in which the said action is brought, or the said judge at chambers, may thereupon, by rule or order, direct that the plaintiff shall recover his costs, and thereupon the plaintiff shall have the same judgment to recover his costs that he would have had if this act had not been passed.

"By s. 14. an appeal is given in these words: if either party in any cause of the amount to which jurisdiction is given to the county court *by this act* shall be dissatisfied with the determination or direction of the said Court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any of the Superior Courts of Common Law at Westminster, two or more of the puisne judges whereof shall sit out of term as a court of appeal for that purpose; provided that such party shall, within ten days after such determination or direction, give notice of such appeal to the other party or his attorney, and also give security, to be approved by the clerk of the Court, for the costs of the appeal, whatever be the event of the appeal, and for the amount of the judgment, if he be the defendant, and the

appeal be dismissed: provided nevertheless, that such security, so far as regards the amount of the judgment, shall not be required in any case where the judge of the County Court shall have ordered the party appealing to pay the amount of such judgment into the hands of the clerk of the County Court in which such action shall have been tried, and the same shall have been paid accordingly. And the said court of appeal may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party, as the case may be; and may make such order with respect to the costs of the said appeal as such Court may think proper; and such order shall be final.

"By s. 15. this appeal is to be in the form of a case, agreed on by both parties, but if they cannot agree, judge to settle and sign it.

"But by s. 16. no certiorari, &c. is to be allowed.

"By s. 17. in certain cases, on agreement of the parties, Court shall have power to try causes, although the matters be beyond its jurisdiction.

"The words of this important clause are these: if both parties shall agree, by a memorandum signed by them or by their attorneys, that the County Court shall have power to try any of the actions hereinbefore respectively mentioned, in which the sum sought to be recovered shall exceed the sum of five pounds by the said recited act, or fifty pounds by this act, limited in the case of such actions respectively, or any action in which *the title to land*, whether of freehold, copyhold, leasehold, or other tenure, or to any tithe, toll, market, fair, or other franchise, shall be in question, then and in such case the said Court shall have jurisdiction and power to try such action: provided always, that the said parties or their attorneys shall state in their said memorandum of agreement, that they know such cause of action to be above the said sums respectively, or that they know such title to come in question in such action, and provided that such memorandum shall be filed with the clerk of the said Court at the time of filing the demand of the plaintiff. Provided also, that all local actions to be tried before any County Court with the consent of the parties shall be brought and tried in that jurisdiction only in which the lands, tenements, or hereditaments, or some part thereof, are situate in respect whereof such actions shall be brought.

By s. 18. there shall be no second suit in second Court for the same cause. Any party so suing shall pay treble costs.

"By s. 19. no action is to be brought against bailiff, &c. acting under order of the Court, without notice; and the clerk of the Court is to be made defendant in the suit.

"By s. 22. judges of the Superior Courts may hear applications for writs of prohibition, either in term or in vacation.

Some of the judges of these Courts compose a short statement of the principal matters which may be brought before the Courts. We give one of these.

"Actions may be brought in the County Court to recover debts of every description not exceeding 50*l.*, or that amount of a larger debt, the excess being abandoned; damages (not exceeding 50*l.*) for assault, trespass, breach of contract, expressed or implied (as) — for non-performance of award, for not accepting or not delivering goods sold, or for breach of warranty thereof; for dilapidations, for breach of guarantee of all kinds, for breach of warranty of horses and other cattle, for breach of indemnity expressed or implied, for negligence by servants or other person, for breach of bye-laws against agents for not accounting, not using due care, &c. Apothecaries and surgeons for unskilfulness, apprentices for breach of articles, bailees of every kind, builders for breach of agreement as to buildings, &c., carriers for losing or damaging property, refusing to carry it, or not carrying it within reasonable time; landlords for breach of contract, expressed or implied; tenants for ditto, masters for ditto, servants for ditto, schoolmasters for ditto, and for all other damages, except damages arising from malicious prosecution, libel, or slander; criminal conversation, seduction, breach of promise of marriage, actions of replevin — for recovering possession of houses or land, where the yearly rent does not exceed 50*l.*, for an unliquidated balance of a partnership account, for a distributive share under an intestacy, for a legacy. And by the written consent of both parties (to be filed with the clerk on the entry of the plaint) — to recover debts or damages *of any amount:* except damages for malicious prosecution; libel, or slander, or criminal conversation, seduction, or breach of promise of marriage. And by the like consent — actions in which the title to land, tithe, toll, market, fair, or other franchise is in question.

"Where the amount of debt or damage, and the conditions of payment can be agreed upon between plaintiff and defendant, such agreement being made before the clerk or assistant clerk, or an attorney, judgment may be entered accordingly, at the office of the clerk, and the attendance of either party on the court day will be unnecessary.

"Executors and administrators may sue and be sued, as if they were parties in their own right."

This forms certainly an attractive bill of fare.

ART. VII.—THE LAW OF ADVOCACY IN ENGLAND.[1]

A RECENT decision of the Court of Queen's Bench with respect to the conduct of proceedings at *Nisi Prius* by a barrister uninstructed by an attorney, involves some legal questions affecting our system of procedure, of great interest at the present moment, both in a professional and public point of view.

In the case of Doe dem Bennett *v.* Hale and another,[2] which came on for trial at the last Gloucester Spring Assizes, both the defendants, up to the day of trial, conducted the proceedings in person on their own behalf; but when the cause was called on, *Mr. Augustus Newton*, who was then a member of the Bar, presented himself as their counsel; and in answer to a question of the learned judge (Mr. Justice Patteson), stated that he was not instructed by an attorney, but by the defendants personally, one of whom was in court. The learned judge then stated that he should not allow him to address the jury or cross examine the witnesses, which must be done by the defendants themselves; but he would hear him argue any point of law which might arise in the course of the trial, on the part of the defendant who appeared in person. Accordingly one of the defendants did put questions to the witnesses, and call evidence; upon which, after a reply by the plaintiff's counsel, a verdict was found for the lessor of the plaintiff.

[1 We have thought it right to put our readers in possession of the law on the subject at the present time, because we are satisfied that the whole subject of the PROFESSION will be speedily discussed by the public with the view of considering whether it is adapted to the present wants of society, or whether any other arrangement as to its members, or any consolidation of its present functions, would be more advantageous or expedient for the public. It must have struck every reflecting person that, now the tide of INQUIRY has once fairly turned upon the law, the results must manifest themselves in unexpected ways. There is at present a vast deal of curiosity shown by all unprofessional classes to discover THE SECRETS of the profession, which appears in many ways. Take, as a specimen, the question, asked in the Salaries Committee, noticed in a subsequent Article, which looks very like *pumping*. — ED.]

[2] Reported in 19 Law Journal, N. S., Q. B., 353.

Mr. Newton thereupon obtained a rule for a new trial, on the ground of the learned judge having refused to allow the counsel instructed by the defendants to address the jury or cross examine the witnesses; and cause having been shown by Mr. Keating, the Court of Queen's Bench made the rule absolute, Lord Chief Justice Campbell observing: —

"There certainly has been an understanding in the profession that a barrister ought not to accept a brief in a civil suit except from an attorney; and I believe it is for the benefit of the suitor and for the satisfactory administration of justice that this understanding should be generally acted upon; but we are of opinion that *there is no rule of law by which it can be enforced.*"

It is not now necessary to make further reference to this case. The result of the question being raised, has been a beneficial one in every point of view. It involves considerations of great professional interest, it may be added, of extreme importance, to the public. The recent changes in our system of judicial procedure have given rise to a variety of questions as to the legitimate line of demarcation which separates the province of the Bar from that of the attorney; and it is exceedingly desirable, with a view not only to the benefit of the profession in its respective departments, but the advantage of the public, that some decisive course should be taken by the members of the profession, or by a higher authority, to finally adjust them.

It was one of the earliest rules of procedure adopted in our tribunals, that no one could plead in a cause not his own, except a regularly admitted pleader[1]; and previous to the statutes establishing the system of appearance by attorney, the appointment of pleaders generally took place only after the parties made their personal appearance[2]; and all our old records speak of the duty incumbent on serjeants and bar-

[1] See passage from *Placitorum Abbreviatio*, 137., quoted by Serjeant Stephen, *Treatise on Pleading*, note 8.

[2] "Every person," we find in the Assizes de Jerusalem, "about to plead in the Supreme Court ought, before he begins, to pray the lord, to appoint him counsel. He ought to pray for his counsel the best pleader in the Court; and this whether he is himself a pleader or not." See the passage quoted in Stephen on Pleading, note 8.

risters of pleading for any who required their services[1]; and the Common Law positively prohibited under the name of maintenance the retainer of counsel, in an action or suit, by any one but the party himself or some one immediately connected with him, as a master or servant, &c.[2] And even in the case of attorneys and solicitors, the Common Law does not only not require their intervention, but, except in the particular instance of a *special retainer of the attorney to stand in the place of the principal, ad lucrandum vel pendendum,* seems to have positively prohibited such practitioners from interfering in the conduct of ordinary legal proceedings[3]; whilst it is broadly laid down that *a counsellor having received his fee, may lawfully set forth his client's cause to the best advantage*[4]*;*

[1] "Countors are serjeants skilful in the laws of the realm, who *serve the common people* to declare and defend actions in judgment, for those who have need of them, for their fees."— *Mirror of Justices.*

[2] "How far a master may maintain his servant. It is said that the master may go along with his servant or with his chaplain, being retained to live in his house with him in order to retain counsel, and that he may pray one to be of counsel for him; and also that he may go with him to the trial, and stand with him and aid him while the cause is tried, but ought not to speak in the court in favour of his cause."— *Hawkins, P. C.,* lib. 1. c. 83. s. 22.

"How far a servant may maintain his master. It seemeth clear that a person generally retained as his servant to do all manner of services, and not for a particular occasion only, may justify riding about to speed his business, and going to counsel in his behalf, and showing his evidences to the counsel or to the jury, and standing by him at a trial between him and another, but it is certain that he cannot lawfully lay out any of his own money to assist the master in his suit."— *Id. ib.* s. 23.

[3] "There is no doubt but that an attorney may lawfully prosecute or defend an action in the court wherein he is an allowed attorney in the behalf of any one by whom he shall *be specially retained,* and that he may assist his client by laying out his own money for him to be repaid again, and also may maintain an action against him for the same by virtue of such a retainer, without any special promise; and it is said also, that attorneys may justify such maintenance in other Courts wherein they are not allowed attorneys, but that they cannot have an action for the money so laid out without a special promise, and that they are no more justified by a general retainer to prosecute for another all his causes than if they were not retained at all, and it is certain that they ought not to carry on a cause for another at their own expense, with a promise never to expect a repayment; and it seems justly questionable whether solicitors, who are no attorneys, can in any case justify the laying out their money in another's suit."— *Id. ib.* s. 27.

[4] Id. ib. s. 26.

and that if a barrister refuse to be of counsel for any when assigned by the Court, he may be excluded from the Bar.[1]

It must be remembered also that in the cases of infants, femes covert, &c., who are positively precluded from appointing an attorney, and are legally presumed to be personally present in Court, the assistance of counsel has always been allowed, and indeed in some cases is legally required.[2] We might also refer to the well established practice of the Courts at Westminster positively requiring the sanction of counsel to demurrers, special pleas, &c.; and in all motions and proceedings in the nature of criminal proceedings, such as prosecutions, criminal informations, motions for attachment, &c.,[3] whether the parties personally engaged in them appear by or employ an attorney or not; and in the few reported cases where disputes have occurred as to the retainer of counsel, it has always been held that not the fact of the counsel being instructed by the solicitor was to be inquired into, but the fact of the solicitor's authority from the client.[4]

We now propose to see how these rules of the Common Law of England, with regard to the relative province of barristers and attorneys, are altered by the Statute Law. By the Attorneys' Act[5] no person other than duly admitted

[1] See Year Book, 11 Ed. 4., fol. 3., where Bryan, Ch. J., observes, "If a serjeant will not be of counsel here with a poor man by our assignment, we cannot make him not a serjeant, for he has his name given by the king, but we can estrange so that he shall not be received to plead," &c.

Littleton, J., observes, "If all the serjeants be dead, we could hear the *apprentices* to plead here (the Common Pleas) by necessity, in ease of the people;" and Genney, serjeant, adds, "If an apprentice in the King's Bench be not of counsel by assignment, the justices can oust him the bar."—*Dyer*, 71 b.; Butler *v.* Freeman, Ambl. 304.

And it is moreover laid down that all other persons may properly be called maintainers who give, or but endeavour to give, any other kind of assistance to either of the parties, in the management of the suit depending between them: as by *opening the evidence to the jury*, or by giving evidence officiously, without being called upon to do it; or *by speaking in the cause as one of counsel with the party*; or by retaining an attorney for him, or perhaps *for merely going along with him to inquire for a person learned in the law*.—Hawk. P. C. lib. 1. c. 8. s. 6.

[2] See the forms of these pleas, Chitty on Pleading, vol. iii. p. 714., &c.

[3] *Exp.* Fenn, 2 Dowl., P. C., 527.

[4] See Butterworth *v.* Clapham, cited 1 Jac. & W. 673.

[5] 6 & 7 Vict. c. 73. s. 2.

attorneys can act as an attorney or solicitor, *or as such attorney or solicitor* sue out any writ or process, or commence, or carry on, solicit or defend, any action, suit, or other proceedings, &c. The positive regulations of the Inns of Court had long before imposed a prohibition against members of the Bar *acting as attorneys*[1]; and in modern times the extreme penalty of *disbarring* has followed disobedience to this rule; but neither the Statute Law nor the rules of the Inns of Court prohibit barristers acting directly for parties who sue out the process, or commence, carry on, solicit, or defend actions, &c. in person on their own behalf, without the intervention of attorneys.[2]

The 9 & 10 Vict. c. 95., as to the County Courts, prevents any one but an attorney, or a specially admitted substitute, to *appear* for any of the parties, and prevents barristers, attorneys, or other persons arguing questions as counsel, except by leave of the judge[3]; but the barrister is not by this statute prevented advocating the case of a party who appears in person[4]; and it will be seen that though neither

[1] "If any hereafter admitted in Court practise as attorneys or solicitors, they are to be dismissed and expulsed out of their houses thereupon, except the persons that shall be solicitors shall also use the exercising of learning and mooting in the house, and so to be allowed by the bench."— *Orders of Privy Council and Judges for Government of the Inns of Court*, Easter, 16 Eliz. 1574.

[2] See the cases of Shuttleworth *v.* Nicholson, 1 Moody and Rob. 254.; and Moscatti *v.* Lawson, *ib.* 454., and 7 Car. & P., and cases there cited.

[3] "No person shall be entitled *to appear* for any other party to any proceeding in any of the Courts established by the said act unless he be an attorney of one of her Majesty's Superior Courts of record, or a barrister instructed by such attorney on behalf of the party, or by leave of the judge, or any other person allowed by the judge to *appear instead* of such party. *But no* barrister, attorney, or other *person, except by leave of the judge, shall be entitled to be heard to argue any question as counsel* for any other person in any proceeding in any Court holden under this act."—9 & 10 Vict. c. 95. s. 2.

[4] The distinction here taken between the provisions of the second section of the act as to *appearing* for any other party, and that which regulates the right of arguing questions as counsel, has been repeatedly taken notice of by the Superior Courts. See *re* Keighley, 19 Law Journ., N.S., C.P., 166., where Mr. Justice Maule observes that the first clause "seems very clearly to apply only to the appearance in the Court as a representative of a party who would otherwise be obliged to appear for himself." It was decided in that case that attorneys could charge a reasonable sum in addition to the amount allowed by the act for appearing and acting in Court. The act throughout makes a distinction

barristers, attorneys, or any one else, are allowed, without the leave of the judge, to argue any question as counsel for any other party, there is nothing in this or any other statute to prevent the judges of these Courts enforcing the old and salutary regulations of the Common Law, which, except in cases of emergency, prevented any one assuming the character of an advocate or counsel, unless he was a member of that order on whom such functions legitimately devolve.[1]

Though, indeed, the 9 & 10 Vict. c. 95. s. 2. expressly gives the judges of the local Courts power, if they think proper, *to refuse to hear any one "argue any question as counsel;"* yet no power is given to confer that character on attorneys or any other class. It is very doubtful even whether the judge has

between the case of parties appearing in their own person and those who appear by attorney. In the latter case the prohibition against a barrister acting directly as the substitute of the party is in accordance with the ordinary principles of law, that a mere advocate cannot, like an attorney, be an agent to directly bind his client. See Colledge *v.* Horn, 3 Bingh. 119.; but if the party himself is personally present, this inconvenience cannot arise.

It is not very easy to put a clear construction on the provisions of this section. The right of the subject to the assistance of professional advocates is a common law right, and cannot be taken away without express negative words. There is not a word in the 9 & 10 Vict. c. 95. depriving the suitors of the assistance of barristers as *advocates*, whether they appear in person or by attorney. The rendering the leave of the judge necessary before *any one* can be "*heard to argue any question as counsel*," clearly cannot have this effect. It appears to us that a court of law would countenance the section as extending to arguments on questions of law only. See the distinction taken in Moscatti *v.* Lawson, 1 Moody and Rob. 454. The laws against maintenance and champerty describe the duties of barristers in the conduct of trials as materially different from those included in the above expressions, these laws prohibiting any other class from "opening the evidence to the jury, or speaking in the cause as one of counsel with the party."—*Hawkins, P. C.*, lib. 1. c. 8. s. 6.

[1] See Reg. *v.* Justices of Denbighshire, 12 New Mag. Ca. 347., 2 New Sess. Cases, 429., 15 Law Journ., N. S., Q. B., 335., where the justices at quarter sessions, who had the same power of admitting persons to act as advocates, as that which the section in question confers on the County Court judges, made a general order giving exclusive audience to barristers, and it was held legal. The question has been once or twice, we believe, brought under the attention of the County Court judges, but a difference of opinion appears to prevail among them with respect to it. The question is of great importance, and if it were properly settled great good would, we are certain, ensue to the members of the profession, and the Bar would rarely be found to enforce the privilege alluded to in the preceding note.

power to prevent the case of a party being advocated by a barrister in the mode in which cases are conducted at *Nisi Prius*[1]; but whether this be so or not, there certainly are reasons for contending that no other persons than barristers can legally be allowed to assume the character of counsel when barristers are actually in attendance.[2]

[1] The case of Doe dem Bennett *v.* Hale clearly decides that on general principles a case is not properly tried in a civil suit, where the party's counsel is refused audience; and the following extract from the Rolls of Parliament at least serves to show what was formerly considered to be the *law* on this point.

By a petition in parliament in 1433, after reciting that "divers parts of the realm, in courts, franchises, and in other lower courts, oftentimes the parties, plaintiffs and defendants, *queux sount in plee* before stewards and judges holding the said courts, bring with them a man to be of their counsel, to count and answer for them in law upon matters for them or against them depending in such Courts such as seems to them wise and profitable, the stewards and judges in the said Courts, often either for affection or love which they have more for one party pleading before them than for the other, and oftentimes for great enmity which they have to their said counsel, will not suffer or receive their said counsel to count or answer in the law for them, whereby sometimes the plaintiffs, and sometimes the defendants, have been often put to great loss, and some have wrongfully been condemned in large sums, and others have utterly lost their matters depending in the said Courts; the Commons pray the king that it may be ordained and established, by the authority of the present parliament, that every man impleading or impleaded may bring with him such counsel (*tiel counseil*) as seems to him good and profitable, to plead and answer for him, according to what the laws and usages of this realm demand, and that the stewards and judges of such Courts may receive such to plead and answer for them in law, unless the persons who should be brought to be of counsel should before that time have been found guilty of any such trespass or thing that they ought not by the law of the land to be received thereto, and that if any such judge do to the contrary the party damnified may recover his damages against him according as the grievance may demand." — Answer: *Il est sufficement purveu p. la commune loy.* — 4 Rot. Parl. 449.

[2] In Rex *v.* Borron, 3 B. & Ald. 438., a case which arose out of the proceedings before a justice of the peace (before the Prisoners' Counsel Act), Lord Tenterden emphatically remarked, "This comment upon the evidence is a thing which an attorney had no *right* to make." In Collier *v.* Hicks, 2 B. & Ad. 663., Parke, J., observes, "Courts must of necessity have the power of regulating their own proceedings, in cases where they are not already regulated by ancient usage;" and Littledale, J., remarks, "In the Superior Courts in Westminster Hall, when barristers attend they only are permitted to act as advocates. Perhaps if they did not attend, attorneys might be heard as advocates." And in Reg. *v.* Justices of Denbighshire, 15 Law Journ., Q. B. 335., Lord Denman thus delivered the judgment of the Court, confirming the order giving exclusive audience to the Bar at sessions:—"It is a most important rule that all courts of justice should have the power of regulating their own proceedings. The exception alluded to by my brother Parke does not apply to the present case,

Two other statutes (11 & 12 Vict. c. 43., and 12 & 13 Vict. c. 106.) go much further, and certainly give attorneys several privileges which they did not previously possess. The first act enabling the parties to have their cases conducted, and their witnesses examined and cross-examined *by counsel or attorney*[1]; and the other act expressly authorising solicitors to appear and plead in bankruptcy proceedings without being *required to employ counsel.* We conceive, however, that the legal meaning of these statutes is, that where the party, instead of appearing and acting in person, appoints an attorney or solicitor to appear and act for him, such attorney or solicitor may act and plead for his immediate principal in the twofold capacity of attorney and advocate; but these statutes do not

where the question is between two branches of the profession. Besides, I think the order made by the justices a beneficial one.

The argument in favour of attorneys would apply equally well to persons not attorneys, who might profess to conduct cases for a less charge than they do; and would apply to this Court as well as others, and would be equally true in all cases. We here try cases of very small amount, but that is no reason why attorneys should be entitled to audience. I think that it is necessary for the interest of all that there should be a distinct order to whom the privilege should be granted in courts of justice, and that we should by no means interfere with the discretion of the Sessions in laying down this rule. They have given a limit in this case, and if they had said sixty instead of four we should have considered they had the power to say it."

"By the orders of the Privy Council and Judges for the government of the Inns of Court it is provided that "no one be allowed to plead before the Justices of Assize, except he be allowed for a pleader in the Courts at Westminster, or shall be allowed by the Justices of Assize to plead before them."—*Orders of the Privy Council and Judges for the Government of the Inns of Court.* Easter, 16 Eliz. 1574.

It must be recollected that Inferior Courts, in the absence of any legal provision to the contrary, are bound "for their order and course of proceeding in all things to fashion themselves to the example of those higher Courts, as of the parents from whom they come."—*Finch*, lib. 4. p. 235.; and see 9 & 10 Vict. c. 95. s. 78.

We must say that some of the solemn decisions of the local Judges on this important question are not altogether satisfactory to our minds.

[1] "The party against whom such complaint is made or information laid shall be admitted to make his full answer and defence thereto, and to have the witnesses examined and cross-examined by counsel or attorney on his behalf; and every complainant or informant in any such case shall be at liberty to conduct such complaint or information respectively, and to have the witnesses examined and cross-examined by counsel or attorney on his behalf."—11 & 12 Vict. c. 43.

authorise the abuse which has grown out of them, of the attorney or solicitor directly retained keeping purposely in the back ground, and delegating the duty of advocating the case to another attorney, who acts as his agent: and neither of these statutes, it must be mentioned, in the least preclude members of the Bar from acting as advocates for parties who dispense with the services of an attorney or solicitor.[1]

Such appears to be the actual state of the positive law with respect to the question now before us, and the next inquiry is, in what way it is affected by the rules of *professional etiquette.*

This is a far more difficult inquiry than the last; for, inconsistent as it may seem, the English Bar, now composed of the formidable number of more than 3000 members, all supposed to be exclusively governed by the rules of professional etiquette, have no officers, no representatives, no societies,

The provisions of the 6 & 7 W. 4. c. 114. s. 1. (repealed only as to proceedings on summary convictions by the present act) are that "all persons tried for felony shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto by *counsel learned in the law*, or by *attorney, in courts where attorneys practise as counsel;*" and notwithstanding this provision, it was held, in the case already cited, of Reg. *v.* Denbighshire, that a new rule of practice, precluding attorneys from practising as counsel in a court where four barristers regularly attended, was legal.

[1] The words of the Bankruptcy Act are, "that every solicitor of the High Court of Chancery heretofore or hereafter duly admitted a solicitor of the Court of Bankruptcy, in manner directed by the statute (6 & 7 Vict. c. 73.), and subject to the provisions in the same act, may *appear and plead* in any proceedings in the Courts, without being required to employ counsel; and in case any person not being such solicitor shall practise in the Court as a solicitor, he shall be deemed guilty of a contempt of Court, and be liable to all the penalties incident thereto."—12 & 13 Vict. c. 106., s. 247.

This clause was introduced into the act whilst the bill was in Committee, and, it is said, at the suggestion of the Incorporated Law Society, in consequence of it having been pointed out in an article on the Province of the Bar, in the "Law Review," that the corresponding clause in 1 & 2 Wm. 4. c. 56. was repealed. (See vol. ix., p. 89.) The advantages contemplated by the original enactment are seldom practically obtained. Little expense is saved; for the *attorney-advocates* manage to get a remuneration even higher than that awarded to the Bar: and the innovations we allude to are calculated to encourage disreputable attorneys mixed up in Bankruptcy matters, to shift the character of the solicitor on the practitioner engaged as advocate; and what is quite as bad, to foster a spurious class of practitioners, who, using the names of accountants, law-clerks, and others, become the only mediums of communication between the parties and their advocates.

who can expound these rules and apply them to the exigencies of the various cases which under the altered mode of procedure are now every day arising. The Bar of England have unfortunately no university answering to the Faculty of Advocates of Scotland, or Order of Advocates in France, or even the Incorporated Law Society of the Attorneys and Solicitors. There are only the Inns of Court who let out chambers and provide dinners, who admit members without inquiring, call them to the Bar without examination, and leave each practitioner to take his own course afterwards, and to learn what is the right, what the privilege, what the etiquette of the Bar, from the actual opinion and practice of the more experienced members with whom he may be acquainted. The Attorney-General as the recognised head of the English Bar, and the higher class of practitioners as the leaders of the various circuits, are occasionally appealed to where a supposed breach of etiquette occurs, but provided there is no direct complaint made, the operation of what is called *Bar etiquette* is anything but satisfactory; the chief hardship being that while we profess to be very strict in adhering to *professional etiquette,* no one can tell what the exact rule is.

It is not, however, necessary for our present purpose to say more on the general operation of the system of *Bar etiquette,* but merely to see how it affects the question before us. "If," Lord Campbell observes, "immemorial usage be relied upon, we must remember that Sergeants, Counters, and other counsel, existed in England long before the time of Edward the First; and there seems every reason to believe that they communicated directly with the parties. Chaucer speaks of—

> "A sergeant-at-law, wary and wise,
> That oft had been at the Purvise."

The *Purvise* is well known to have been a sort of exchange at St. Paul's, where all ranks met to do business, and the sergeants-at-law, like Roman patrons[1], gave advice to all who

[1] The most illustrious of the Roman Bar were accustomed to walk up and down the forum, ready to give advice to all who applied to them; whence they obtained the designation *advocati,* the houses of the more distinguished lawyers being generally besieged by clients, who both at home and in public requested

came to consult them. Afterwards each sergeant-at-law had a pillar in the cathedral assigned to him, where he stood and communicated with his clients.[1] The advantage to be derived from subdividing the business of conducting a suit, and having two orders in the profession of the law between whom it should be distributed, became more and more felt; but for a long time the attorney only sued out process, and did what was necessary in the offices of Court for bringing the cause to trial, and for having execution on the judgment."

As a general rule in civil cases, we believed the members of the Westminster Hall Bar have, with a view to their own, as well as the public convenience, adopted for upwards of a century the rule to refuse their professional aid to persons who do not employ an attorney. There are, however, numerous instances of this rule having been infringed in modern times when a sufficient reason presented itself.[2] It is not generally observed in the case of criminal defences[3], and indeed the rule is one entirely framed by the Bar, who can immediately render it inoperative if it is found expedient to do so.

permission to ask their advice. Colquhoun on the Roman Civil Law, § 329. See Horat. Satir. lib. i. sat. i. v. 9. Tibull. i. 4. 78. Cic. de Orat. i. 45. The practice of taking instructions directly from the client was followed by the most eminent members of the English Bar up to a recent period. "Here might one," it is remarked in Fuller's Church History, "have seen almost as many writers as hearers. Not only young students, *but even the gravest benchers* (such as Sir Edward Coke and Sir James Astham then were) *were not more exact in taking instructions from their clients* than in writing notes from the mouths of their ministers." — Lib. 9. p. 216.

[1] Sir William Dugdale, in speaking of an alleged Inn of Court in Paternoster Row, observes, it was said to be "next to St. Paul's Church, where each lawyer and serjeant, at his pillar head, heard his client's cause, *and took notes thereof upon his knee;* as they do in Guildhall at this day: and that after the serjeants' feast ended, they do still go to Paul's in their habits, and there choose their pillar, whereat to hear their client's cause (if any come), in memory of that old custom," Orig. Jur. c. 55., p. 142.

Lord Campbell, speaking on another occasion of this custom, observes, "there was nothing discreditable in this custom: and some provincial counsel are still said to 'keep the market' in the towns where they reside." — *Lives of the Chancellors*, vol. i. p. 32.

[2] See Redhead *v.* Yorke, cited 1 Car. & P. 548. Moscati *v.* Lawson, 1 Moody & Rob. 454. 7 Car. & P. 34.

[3] See Rex *v.* White, 3 Campb. 98. Rex *v.* Parkins, 1 Car. & P. 548.

The rules of practice prevailing in the Courts at Doctors' Commons positively require the sanction of counsel to every important step that is taken in the conduct of a cause.[1] There are no such positive regulations prevailing in the Courts at Westminster. An attorney or solicitor may, if he please, conduct the whole of the proceedings up to the very eve of trial on his own responsibility. It is not necessary to say whether this discretion which attorneys and solicitors now possess in the conduct of civil proceedings is wisely or unwisely exercised. The change from the old system by which regulations similar to those prevailing in the Courts of Doctors' Commons were practically observed at Westminster Hall, has certainly not decreased the number of frivolous, groundless, or vexatious actions, or the ordinary expenses of litigation, nor avoided the abuses of special pleading. We do not say whether or not the old system should

[1] Burn's, E. L. vol. i. p. 8.

[2] For the furtherance and increase of learning, and the advancement of civil and canon law, it is ordained that no proctor, exercising in any of the Archbishop's Courts, shall entertain any cause whatsoever, and keep and retain the same for two Court days, without the counsel and advice of an advocate, under a pain of a year's suspension from his practice; neither shall the judge have power to release or mitigate the said penalty without express mandate and authority from the archbishop.—*Can.* 130.

"And no judge in any of the said Courts shall admit any libel, or any other matter, without the advice of an advocate admitted to practise in the same Court, or without his resumption; neither shall any proctor conclude any cause depending without the knowledge of the advocate retained and feed in the cause, which, if any proctor shall do, or procure to be done, or shall by any colour whatsoever defraud the advocate of his duty or fee, or shall be negligent in repairing to the advocate and requiring his advice what course is to be taken in the cause, he shall be suspended from all practice for the space of six months, without hope of being thereunto restored before the said term be fully complete." —*Can.* 131.

"No inhibition shall be granted out of the Archbishop's Court at the instance of any party, unless it be subscribed by an advocate practising in the said court, which the said advocate shall do freely, not taking any fee for the same, except the party prosecuting the suit do voluntarily bestow some gratuity upon him for his counsel and advice in the said cause: the like course shall be used in granting forth any inhibition at the instance of any party by the bishop or his chancellor against the archdeacon, or any other person exercising ecclesiastical jurisdiction. And if in the court or consistory of any bishop there be no advocate at all, then shall the subscription of a factor practising in the same court be held sufficient."—*Can.* 96.

be restored, but in the present state of the legal profession it is exceedingly proper that all the circumstances bearing upon the question should be kept in mind.

ART. VIII.—MANAGEMENT AND COST OF PRISONS.

Report of the Select Committee of the House of Commons on Prison Discipline. 1850.

As the inquiry by the Select Committee on Prison Discipline last session (whose interesting Report we recommend for general perusal) will probably be followed by some legislative measure, it seems a convenient opportunity to consider the present state of the law with reference to prisons, including the mode in which the funds are raised for defraying their cost.

In the remarks that we may offer we shall not treat of different systems of prison discipline, but shall confine our attention chiefly to those matters of general law which are independent of particular systems of management.

The chief Act now in force for the government of prisons in England and Wales is the 4 Geo. 4. c. 64.; though some previous acts still remain unrepealed, and there have been several subsequent acts.

Under the provisions of these different acts, the chief power is vested in the body of justices of the peace; of the justices for the counties in the case of county prisons; and of the justices for the boroughs with regard to borough prisons. Some of the power, however, is placed in the hands of the sheriffs; and, in the case of the borough prisons, in those of the town councils.

In some respects these different authorities are under the control of the Secretary of State, but in others they are independent.

It thus appears that several thousand persons have at

present a direct power in the management of the prisons of this country.

The justices at their general or quarter sessions can decide upon the propriety of building new prisons, and of altering old ones; and, subject to the approval of the Secretary of State, can choose the plans on which the building shall be erected. They have also, as a body, the appointment of all the prison officers, with the important exception, however, — in cases of gaols used for the detention of debtors and untried prisoners, — of the Governor, who in such prisons is appointed by the sheriff.

In all matters entailing expense the justices must, in the case of borough prisons, obtain the consent of the town council: an arrangement which, in practice, necessarily often gives the council a veto not only on the adoption of plans for changing the system of discipline, but, to a certain extent, on the appointment of the officers. Indeed, these bodies have in some instances laid claim to such appointment as their exclusive right: and, in certain cases where local acts or customs operate, this right has been conceded to them; though the general rule, as laid down by Lord Denman in the case of Regina *v.* Lancaster[1], is that the power of appointment rests with the parties.

From the foregoing short sketch, it will be seen that an essential principle of all good government — that of a responsible but supreme authority — is at present wanting in relation to our prisons; and this single fact we consider to be a sufficient explanation of the frequent jarring that occurs between the different authorities, and the slow progress which has, in many cases, been made in general improvement.

In practice the sheriffs are, we believe, in the habit of generally acting on the recommendation of the justices in the choice of the governors of gaols; but this is not always the case.

The justices at large appoint visiting justices, who, indeed, are specially recognised by the Law, and to whom it assigns many duties: but the general body of justices are neither

[1] 10 Q. B. 962.

required nor empowered to invest the visiting justices with full authority relative to the prisons, or with power even to select a single officer; and, although virtually the visiting justices do often appoint the officers, it sometimes happens, in the case of the chief officers (on whom the good management of the prison of course mainly depends), that an active canvass takes place among the whole body of justices; and that many vote who can have very little knowledge as to what qualifications are requisite, or how far such qualifications are possessed by the person who applies for their suffrage.

It appears by the Reports of the Inspectors of Prisons that in one case nearly seventy justices voted in an appointment of a prison officer; and we know another case in which the number reached a hundred, though here the election was rendered abortive by the sheriff afterwards claiming his power of appointment and choosing another person.

Not only must the great body of the justices be unable to judge, *à priori*, of the qualifications of a governor or other prison officer, but as many of them reside at a considerable distance from the prison, they can have but little opportunity of afterwards judging of the propriety of their choice.

A necessary result of such an arrangement is great difficulty in effecting the removal of inefficient officers.

Another power exercised by the justices, as a body, is that of framing rules for prisons, in addition to those prescribed by statute. And here again the want of knowledge of the principles of the sciences of punishment and moral training, which, like all other sciences, require close and special study, and the want of a practical acquaintance in many cases, with the peculiar circumstances of the particular prison to which the rules are to apply, must act very injuriously, although the evil is in this case much diminished by the power now given to the Secretary of State to revise and alter such rules.

We should deem it a great improvement if all direct power with regard to the prisons were transferred from the justices as a body to the visiting justices; and we should hold it an important step in the right direction if such delegation were even permitted. But though this were done, and the clashing authority of the sheriffs and town council also re-

moved, the arrangement for the government of the prisons would still, we think, be very imperfect; for, independently of any objection that may be taken to the constitution of what might then be called the constituent body, the visiting justices, as now chosen, must often be ill qualified for the duties they are called upon to discharge; the ground of selection depending chiefly on the accidents of proximate residence to the prison, leisure time, and willingness to undertake the task, which, we need scarcely remark, may all exist in the absence of the essential qualification for their office. Their number, moreover, is often too large for efficient action, and they usually act not in continuity but by rotation; each, probably, with an insufficient acquaintance with the views and proceedings of his predecessor.

Lastly, the visiting justices cannot have that feeling of strict responsibility which attaches only to paid services. Considering that they act altogether gratuitously, many of them give much time to prison duties, and are deserving of the public gratitude. Still it cannot be expected that a gentleman so circumstanced will set aside private business or forego visits to distant places which remove him, for a season, from the neighbourhood of the prison.

Although the Secretary of State has, as we have seen, power to alter rules laid down by the justices at quarter sessions, it may be doubted whether he has authority to abrogate or modify such rules as are contained in acts of parliament; and, we believe, that in fact he does not exercise such an authority. But without this power being vested either in the Secretary of State or in some other party, ready at all times for deliberation and action, it is vain to hope for any thing like a series of well-directed experiments, careful deductions, and the gradual establishment of broad principles of prison discipline and of skilfully devised plans for carrying these principles into effect.

We protest *in toto* against the practice of minute legislation, but in few things has this practice been carried to a more pernicious extent than in prison discipline; for by ill-considered clauses in acts of parliament almost all the ordinary motives to industry have been destroyed, and systems

of classification have been laid down by which the young, artless, untried, and, as may ultimately appear, wholly *innocent*, are often thrown into the society, for months together, of the most consummate knaves and most hardened criminals.

The expense of erecting prisons is defrayed out of the county rates, or the funds of the borough, as the case may be; and part of the current expenses is provided for in the same way; but a considerable portion of the cost, after conviction, of all prisoners tried at the assizes and quarter sessions is now paid out of the consolidated fund.

With respect to the future government of the prisons, we agree with the Committee on Prison Discipline in thinking that large powers should be granted to a central board, subject to the authority of the Secretary of State; but instead of looking to Parliament to frame rules for the regulation of the prisons, as suggested in the second resolution of the Committee, we would place this power in the hands of the Board, as is the case in Scotland, where a Board of the kind proposed (unpaid, however, and too numerous) has been in existence for some years, unfettered by rules in acts of parliament.

In Scotland the local administration of the prisons is confided to County Boards, chosen, in part, by the landowners, and in part by the Town Councils; in which boards the most important member is generally the local judge, or Sheriff Substitute, as he is termed. And boards somewhat similar to these, and affording an opportunity for the country continuing to benefit by the aid of such of the present visiting justices as are able and willing to render good service, might be constituted in England; though we would suggest that in each case there should be one paid and responsible member.

In the bill for providing and regulating prisons in Scotland, as it was originally introduced into Parliament, the whole of Scotland was treated, with regard to prisons, as one unbroken territory, with undivided interests; and we believe that the results of the system established in Scotland, economical and satisfactory as it has been when compared with what exists in England, would have been far more economical and far more satisfactory, in other respects, had the bill

been allowed to pass in its original shape; and we would strongly urge the adoption of this principle of combined action in any measure that may be introduced for the management of the prisons in England. The evils arising from the want of such a system are dwelt upon in several of the reports of Mr. Frederic Hill, one of the Inspectors of Prisons. This want leads, in the first place, to an unnecessary multiplicity of prisons, there being often not only separate prisons, each with a separate staff of officers, in the same neighbourhood, as in the case of Newcastle and Durham, Derby, Leicester, Oakham, and Nottingham, but even two district prisons in the same town (one for the county and one for the borough); whereas under the arrangement we have adverted to, every prison would be available for the whole district round about; and, indeed, for prisoners from every part of the country, in cases where the age or peculiar occupations of the party might make it desirable to send him to that particular prison.

One great cause of the unproductiveness of the labour of prisoners at present is, the circumstance of a great variety of persons, differing in age, sex, and occupations, being collected together in one building; an arrangement which makes it necessary, if the prisoners are to be employed at their ordinary occupations, to carry on twenty or thirty trades there, instead of only one. But if the prisoners could be distributed without regard to territorial divisions, some single productive occupation might form the staple employment at each prison; and thus, at a small expense, proper tools and other apparatus might be provided, and suitable officers engaged for the superintendence of the work.

Some prisons might be adapted for agricultural labourers, and placed in districts where there is land to reclaim, or where spade husbandry can be most advantageously employed. In other places manufactories, chiefly of the simpler kinds, and employing much manual labour, might be established.

In this way the great bulk of the prisoners, who were either masters of a trade or had partially learnt one, would continue to be employed at it; and thus be enabled to keep

up and to perfect their knowledge of the means of earning an honest livelihood, and at the same time be made to pay, by their labour, the cost of their imprisonment.

Other very important advantages would accrue from an unrestricted power of distributing prisoners; for, not only might similarity of occupation be taken into consideration, but the prisoners might be classed, to a considerable extent, according to their moral condition and improvement; an arrangement which, among other benefits, would render it no longer necessary for all prisons to be constructed with the present regard to strength and the prevention of escapes, as a very few prisons would probably be found sufficient for that desperate class of offenders who are beyond moral control, and are not to be retained by any but strong physical barriers.

It is almost ludicrous at present to observe the thick walls and ponderous bolts and bars that are provided to keep in a child eight or ten years old, or an old woman scarcely able to lift a common door-latch.

Much relief too would be afforded to the different prisons by the establishment of a general prison lunatic asylum, as also an hospital for confirmed invalids.

All who have inquired into the chief items of the heavy expenses caused by the prisons of the country must be aware that the greatest charges are those of buildings and officers; and that any measure that can prevent the necessity for building so many prisons, (especially so many prisons where great strength is required), or for having so many staffs of officers, would very materially lessen the cost of prisons.

It appears by one of the Reports of the Inspectors, that the cost, *per head*, of the chief and latest portion of the county prison at York (which appears to have been constructed with a view solely to strength), was more than 1200*l.*; "enough," as the inspector observes, "if it had been desired, to build for each prisoner a separate mansion, with stable and coach-house!" And in the smaller prisons (most of which might be dispensed with under a system of general union), where the staff of officers is generally very large in proportion to the number of prisoners, 15*l.* and even 20*l.*

per head is no uncommon charge as the *annual* cost of officers.

A strong reason, which did not exist when the Scottish Bill was passed, for abandoning the old divisions (with regard to prisons) into counties and boroughs, is, that, as already stated, a large portion of the cost of prisoners is now defrayed out of the public exchequer, instead of falling on the particular localities in which the prisons are placed. For any supposed advantage which might arise from a motive in local authorities to keep down the expenses of their prison to the lowest point has now been greatly diminished, and would doubtless be very dearly purchased, even in the narrowest sense of the term, by a sacrifice of the advantages of complete union.

We are glad to see that district prisons (combining several counties) are recommended by the Committee; but we hope that the principle of union will be carried yet farther, and that the whole country will be united under one effective administration, aided by local boards, such as we have suggested.

While, however, we are of opinion that the number intrusted with direct powers in the regulation of the prisons should be small, we think it would be advantageous to give the whole magistracy a right of inspection, and that they should be invited to record in a book, to be kept for that purpose, the result of their observations, with any suggestions that might occur to them.

With regard to the payment of the expense of prisons, we think that, in the first place, under the arrangements suggested, and with the gradual discontinuance of the practice of short and repeated imprisonments, the whole sum to be provided for would be comparatively small.

It is well known that in America some of the prisons are wholly self-supporting, and we see no reason why English prisons also should not be self-supporting, especially now that food has become so cheap. As yet, however, an expenditure has to be provided for, and we would submit for consideration the following plan for defraying it:—

At present the cost of each imprisonment, being thrown on

the rate-payers generally, is cast on those whose exertions could have done but little to prevent the necessity. A very different rule, however, is, of course, to be desired, and we think such a rule attainable.

The party immediately responsible for the expense which his acts have entailed, and to whom it is most important to present powerful motives for obedience to the laws, being the culprit himself, he is the person to look to in the first instance for paying, by his labour or otherwise, the cost of his imprisonment; and if it were possible to enable every prisoner by steady industry to earn the whole of this cost, no further provision would be necessary, nor in most instances desirable, the performance of this duty being made one of the terms of the prisoner's liberation.

Where, however, the offender himself would be unable, by any reasonable exertion, to pay the whole expense of his confinement, we are of opinion that (as in a case of pauperism) the parties next to look to are the offender's parents, and that unless they can show to the satisfaction of the Court, or other appointed authority, that they have used all reasonable means to prevent their child from becoming a criminal, part of the cost of his imprisonment should fall on them; the remainder, if any, being paid out of the public Exchequer.

With respect to the buildings which may hereafter be necessary, we would suggest that they should be paid for out of a rate to be levied on those counties and boroughs which have not already provided a sufficient quantity of available prison accommodation, and that the rate should be levied in such instance in proportion to the deficiency.

As we stated at the commencement of this article, it is not our purpose to discuss different systems of prison discipline, but we cannot conclude without expressing our cordial assent to the following resolution of the Committee, as one which ought always to be kept in mind, whatever system be adopted: —

"That the Committee concurs with some of the most experienced witnesses they have examined in the opinion that

the great majority of convicted prisoners are open to the same good motives and good impulses which influence other human beings; and therefore that a system of encouragement to good conduct, and endeavours to inspire feelings of self-respect, self-reliance, and hopefulness for the future, which have been tried in some of our largest establishments, ought to be adopted, so far as is practicable, without impairing the penal and deterring character essential to any system of imprisonment."

ART. IX. — MINISTER OF JUSTICE. — LORD BROUGHAM'S LETTER.

A Letter to Lord Denman from Lord Brougham, upon the Legislation of 1850, *as regards the Amendment of the Law.* Ridgway, 1850.

Our readers are aware that it has been one of our great aims and objects to establish in this country a Minister of Justice; to add to the existing ministers of the Crown one whose express business it should be to ensure the due administration of justice in accordance with our existing faulty system, so long as that faulty system is permitted to continue, and its gradual and certain improvement is going on. Hitherto, our arrangements for the improvement of the law have been based on the higglety-pigglety, the hap-hazard principle. The functions of a Minister of Justice have fallen, by mere accident, or perhaps by caprice, some one way, some another; some to the Lord Chancellor, some to the Home Secretary, some even to the Prime Minister. A few years ago, the Lord Chancellor woke one fine morning, and discovered to his great surprise, and to his greater discomfiture, that he had been accidentally stripped of the patronage of the twelve most important offices in his Court, those of the Masters of the Chancery; which had been transferred, by the same accident, to the First Lord of the Treasury, who, *primâ facie*, had no

more to do with the matter than the Chancellor would have to do with the patronage of the junior Lordships of the Treasury. We almost wonder that the Lord Chancellor did not immediately claim the patronage of those junior Lordships, not of course with any hope of getting it, for Prime Ministers are no doubt familiar with the proverb —

> "Get what you can, and what you get, hold,
> 'Tis the stone that will turn all your lead into gold;"

but just to put in a light, intelligible to the meanest capacity, the unreasonableness of allowing one man to select another man's servants; or, to use a very expressive American phrase, another man's "helps." The history of this transaction is thus given in Lord Brougham's Letter: —

"It is well known, that in order to keep the judicial body pure, and to prohibit all access of political or party intrigue, the Chancellor selects all the Puisne Judges and the Chief Baron, without even naming to his colleagues the object of his choice until he has taken the King's pleasure. When the bill was passed in 1833 for new modelling the chancery offices, I introduced a provision intended to place those important functionaries, the Masters, on the same footing with other judges. Formerly they were appointed by the Chancellor calling up any one he chose, and laying his hat on him. He was immediately sworn in, and became a Master, invested with a very large jurisdiction. Nothing could be less fitting, indeed more unseemly, than this mode of appointment to a high judicial office; and the act of 1833 made the Masterships be held by patent, exactly like the places of other judges. Of course no one who supported the measure could have the least idea that what was done expressly to place the Masterships on the highest footing could be so perverted by ministerial grasping after patronage, as to open a door through which intrigue and party spirit might enter. It was to be expected that the Chancellor would name the Masters as he names the Judges — taking the Royal pleasure before he even consulted a colleague. But I am sorry to say this has not been done. Ministers have named, and Chancellors have weakly submitted. Hence Masters have been made under the pressure, now of an Irish demagogue — now of an electioneering conclave — and a great abuse of judicial patronage has without doubt been committed. I venture to hope that this very serious evil — such I certainly regard it — will be tolerated

no longer. It seems enough that we denounce such things to make them for ever cease." (Pp. 35, 36.)

If we had a Minister of Justice responsible to Parliament and the country for the due administration of justice, could a violation of his rights, so gross as the above, have occurred? Could any Prime Minister have said to such an one, "You are responsible for the due performance of the duty of the office, but I will nominate the officer?"— the very notion is absurd. But we go further. We contend, that not only ought the undivided responsibility for the due administration of justice, including the nomination of proper judicial functionaries, be vested in one minister, but that minister should be made more directly responsible for the proper selection by being obliged to announce to Parliament each nomination as it takes place. At present, nominations are made, sometimes from political and party motives, sometimes under the dictation of personages of lofty station, sometimes under the influence of private friendship, and no member of Parliament interferes to protect the public. Not a word is said, however improper the appointment; or if a word is said, the speaker is at once silenced by being told, that the constitution has entrusted the selection to some individual minister, and that it is indecent for any private member to interfere. The patronage is spoken of as though it were private property, not a public trust; and, though it is no longer sold, as once it was, it is still too often prostituted. We cannot but think, that the time is come when the progress of reform should furnish some check to this monstrous evil, and it is difficult to conceive a better check than the vesting of the whole patronage of the law in one minister, and making that minister doubly responsible for the due exercise of his patronage, by compelling him to announce to both Houses every appointment, as it is made.

We have long been watching, and with intense interest, the progress which the question of establishing a Minister of Justice has been making in the public mind. We hope that we have ourselves given it a forward push. But we readily acknowledge, that our contributions have been as nothing,

compared with that which has lately been furnished by the admirable letter, addressed by the President of the Society for promoting the Amendment of the Law to the late Chief Justice of England, whose unavoidable retirement from office has occasioned so much regret. The first paragraph of that letter shames us into hope, and stimulates us to greater exertions, for who can despair when his Lordship thus expresses himself:—

"You will probably wonder (like other friends) at my persevering in these all but hopeless pursuits. I often reflect on what Mr. Burke says in some part of his immortal writings (those perennial sources of political and moral instruction), that he had throughout his public life ever found his attempts to serve his country, opposed, and himself treated, exactly as if he had been working for some selfish object, and with merely interested views. The forty years that I have passed in vain attempts to improve the Education of the people, and in efforts only a little less successful to Amend the Laws they live under, have given me a constant taste of the same bitter truth. I should have been less opposed, far more tolerated, probably even more successful, had I devoted myself to the pursuit of some personal object. Therefore, again you will ask why, with so little remaining of my appointed time here below, I should go on hoping against hope, and harassing myself, and vexing others, with efforts which experience seems to prove nearly fruitless?

"The only answer to this question is, that though the disappointment has been grievous in the departments of our Jurisprudence where the work appeared easiest, and was most important, yet that a good deal in other branches has been effected. Of the great defects in our Common Law, exposed by me in Feb. 1828, nearly the whole have been removed, in consequence of the Commissions issued by our friend Lyndhurst, as the best answer he could make to my motion, and of the bills which I passed with his co-operation, when I succeeded him as holding the Great Seal. A good deal has since been effected by the unwearied labours of the Law Amendment Society — and even the last session, full of disappointment as it is, leaves the law somewhat, perhaps materially, improved. Encouragement is to be gathered from these circumstances, and one is bound not to abandon the good work as long as any prospect of further success remains. This, then, is my excuse for fatiguing you, the profession, the Parliament, and the country at large, with a repetition of my complaints, and a renewal of my

exhortations. If we have any chance of ultimate success, it can only be by diligently showing what the failure has been, where the fault lies, and whence the brighter prospect is to dawn upon us. I therefore shall attempt this revision after briefly stating what was done during the late session to advance our great cause." (Pp. 1—3.)

The noble Lord having then referred to the measure of last session for extending the jurisdiction of the County Courts, and observed how "capricious and uncertain" our legislation has been on that most important subject, declares his opinion, that our legislature has been so capricious and uncertain, because —

"We have not a Minister of Justice, a great functionary, whose province it is to mature all plans for amending the law, as well as to superintend those who are engaged in administering it. A valuable report on this important subject was presented from one of our Committees to the Law Amendment Society in 1845, and by me, as its President, transmitted to the Lord Chancellor and Prime Minister, both of whom promised to give it their best attention. Had such a department as we then proposed existed, I am certain no such proceedings as I am going to describe ever could have been witnessed, to cast discredit on both the Government and the Parliament." (Pp. 3, 4.)

His Lordship then gives a very amusing account of the conduct of the Government with reference to that Bill, their early attempts to smother it outright in the House of Commons, and their ultimate acceptance of it, with many most important additions made to it in the House of Lords, — the Bill, though relating to the most important of all subjects, the recovery of debts not exceeding 50*l.*, that is, of ninety-nine hundredths of all the debts that become due, having been proposed, not by the Government, whose duty it was to propose it, if such a measure were really wanted, but by a private member, lately an officer in the army, and having been left to the chance support of private members in both Houses. It passed, indeed, but, as Lord Brougham observes, "with some defects which would have been avoided, as would have been the unseemly spectacle of the blunders and ignorance, the jars and conflicts, which I have described, had a department

existed in this, as in other countries, where it is far less wanted, — a department charged with the superintendence of our jurisprudence." Is not legislation by a soldier on the law of debtor and creditor higglety-pigglety legislation? Is it not hap-hazard legislation? Is this the legislation we have a right to demand from the government of reform, the pioneers of improvement?

His Lordship then turns to another crying evil — the shameful expenses and delays incident to Chancery proceedings. Has any thing been done by the Government to remove these? Nothing at all. True it is that something has been done, but not by the Government, not by a Minister of Justice. A private member, Mr. Turner, has, to his great honour, devoted much labour, and incurred some expense, in performing part of the duty which belongs to the Government. He has prepared and carried through a most useful Bill, with which his name will ever be honourably connected; but this also is higglety-pigglety, chance-medley legislation. Good as his measure is, we doubt not that a well-advised Minister of Justice could have produced a better, because a simpler one. The evil Mr. Turner sought to cure was a rule of the Court of Chancery, preventing that Court from ever declaring a right except with a view to the administration of property in conformity to that declaration. The way to cure that evil would have been to recite the existence of the rule, and to enact that thenceforth it should be the duty of the Court of Chancery to declare rights, when duly called upon by the parties interested, although the plaintiffs did not ask the administration of any property. This method of legislating, reversing an old and mischievous principle or rule, and enacting a new one, *without more*, that is, leaving to the Court itself the carrying out of the new principle or rule, in accordance with its existing system and machinery, would be, as we conceive, a much better mode of legislating, than the affirming the principle, and then stuffing the reform bill with a heap of details as to the mode of carrying it out. Lord Brougham laments, and with reason, the death by neglect of his brother's Bill for reforming the Master's office, which passed the House of Lords without a dissentient voice. We really think, that

there ought to be a new heading in the Bills of Mortality, "Death *by neglect of the House of Commons*," and that under that head should be classed all Bills, which pass one house with Government sanction, and die in the other for want of Government nursing. The Registrar of births and deaths should look to this. Why was this Bill suffered to drop? the alleged reason, that it would interfere with the New Chancery Orders, was absurd. The Chancery Orders will hurry routine business with the Master's office no doubt; but they will not hurry it *on* when it has reached that "slough of despond." Hitherto our Chancery reforms have been applied in the quarter which least demanded them. We multiplied courts to make orders of reference, eight or ten years ago, and we have lately invented methods enabling the courts to make these orders more rapidly than ever; but the practical effect has been, only to make the "slough of despond" a worse quagmire than ever. It now puts one in mind of the hole into which Mr. Cumming Gordon's Cape waggon got, when his own and his neighbours' beasts, twenty-six in number, failing to pull it out, gave up the effort in despair. "The cunning beasts," says he, "having now exerted themselves in vain, and being well aware that the waggon was fast, according to their usual custom, could not be induced to make any further effort." The Master's office is now almost at a stand-still; for besides the masses of paper, daily carted thither under the operation of the old law of reference, there is all that comes in under the New Orders, and all that comes under the Winding-up Acts, so that, unless what Lord Byron calls "human cattle" are very different from Mr. Gordon's Cape cattle, they must shortly "strike work." What the true remedy is, it may be difficult to say. But of this we are certain, that it will never be found, till the search for it is entrusted to a Minister of Justice, to one who will have time to devote a diligent and continuous attention to the subject.

Then see the wretched progress which the formation of the Criminal Law digest and code of procedure have made. "Nearly 100,000*l.*," says Lord Brougham, "has been spent on the work; seventeen years have elapsed," yet the result is — nil!! 2000*l.* more, says his Lordship, is wanted

to complete the work, and yet the Commission has been suffered to expire." What is the cause of all this lamentable waste? it is patent. In every thing connected with Law Reform, the Government is at the mercy of the Head of the Law, and the head of the law is almost, by the necessities of his education and position, prejudiced against Law Reform, for Law Reform must of necessity involve two things, each hateful to the heads of every science, the having much to learn and the having still more to unlearn. If Law Reform is to be effectually carried out, it must be by a Minister of Justice, and that minister a *statesman* rather than a lawyer, a BACON rather than a COKE.

The present seems a conjuncture singularly favourable for taking an enlarged view of this and some other kindred subjects. The unsatisfactoriness of the appeal jurisdiction as administered in the House of Lords — the monstrous abuses of Chancery — the inconveniences connected with the separate government of Ireland, as though Ireland were a separate kingdom, not part of the united empire; as though the act of union were a fiction, not a reality, — these and other subjects intimately connected with each other demand a joint and an enlarged consideration, and they must receive it. For ourselves, we do not pretend to see our way clearly, but of some things we are certain. We are sure that there is now no more occasion for a Lord Lieutenant of Ireland, than there is either for Lords of the Marches of Wales or Scotland, or for a President of the North; railways and electric telegraph have practically abolished the office,— we are sure that the Head of the Court of Chancery should be as irremovable a judge as the Chief Justice of the King's Bench is, — sure, that the vesting the appeal in the last resort in a body of hereditary nobles is a monstrous anomaly, — and equally sure, that there should be a Minister of Justice, in whom and his assistants, his official *staff*, there should be vested all that superintendence over the administration of justice, and the making of new laws, which is now left to the chance attention of the Lord Chancellor, the Home Secretary, the Chancellor of the Duchy of Lancaster, the Attorney and Solicitor General, and we know not how many other paid, though anonymous functionaries. How to

re-arrange the system and better allocate the duties, we will not at present offer any opinion, but, in lieu of it, will re-print a printed paper sent to us anonymously some time ago. We confess we think it contains suggestions deserving calm and mature consideration.

"ARRANGEMENTS, *which might be adopted, in connection with the contemplated* ABOLITION *of the office of* LORD LIEUTENANT OF IRELAND, *the Appointment of a* FOURTH SECRETARY OF STATE, *and the Separation of the Judicial and Political Functions of the* LORD CHANCELLOR.

"I. IF the Fourth Secretary of State were made Secretary of State for the affairs of Justice, as proposed by Lord Langdale, (see his lordship's evidence, Fees Committee, H. of Com., 7 Feb. 1848., QQ. 1427—29, 30., 1491 to 1500), he might superintend the whole administration of justice, both in England and Ireland. The preparation of new laws, for the better administration of justice, would naturally belong to his department.

"II. If the above arrangement were made, it would withdraw a large portion of its business from the office of Secretary of State for the Home Department; and then that department might act for Ireland as well as England.

"These arrangements would tend to consolidate the union between England and Ireland. A Secretary of State exclusively for Irish affairs, seems inconsistent with the notion of an entire union between the two countries.

"III. It is assumed that the Head of the Court of Chancery will be a judicial officer only. His position, though higher than that of the Lord Chief Justice of the Queen's Bench, would be analogous to it.

"IV. If it is essential that an eminent lawyer should assist at Cabinet deliberations, the Attorney-General might be a Cabinet Minister. It seems fitter that the most eminent Counsel should be consulted on Cabinet questions than the most eminent Judge.

"V. It has long been doubted, whether the ultimate appellate jurisdiction should remain vested in the House of Lords, or be transferred to the Judicial Committee of the Privy Council. But, whatever tribunal may be made the ultimate Court of Appeal, it seems clear that such Court should have a permanent President. Every judge of the Superior Courts might be made a member of the Court, and the President might summon, from time to time, such members as seemed to him most likely to give valuable assistance, having regard to the subject in debate. Under such an

arrangement, if the arrear of appeals became considerable, the Judicial Committee might form itself into two tribunals, the second having a President appointed for the occasion.

"VI. Such of the patronage of the Lord Chancellor as concerns the administration of justice, might be transferred to the Secretary of State for the affairs of Justice, and such as concerns the Church to the Prime Minister.

"VII. The House of Lords might choose its own Speaker, or the President of the ultimate Court of Appeal might act as such."

"10*th June*, 1850."

It only remains for us to make one or two further observations on the Letter of Lord Brougham to Lord Denman, to which we have already casually alluded. Often as the good cause has been before indebted to his Lordship, perhaps he has never rendered better service than by this opportune letter. Lord Brougham stands in many respects in the same relation to the Amendment of the Law as the Pope to the Roman Catholic church. We do not believe in the infallibility of either, but every true follower of Law-Amendment will receive with sincere respect and true regard any communication made by one who must be recognised by all as the great apostle of the true faith.

Among other annuals which come into bloom at this season of the year, one of the most valuable is the autumnal letter on the Law which his Lordship has been of late years accustomed to write. This is dated 12th of August, a day well known on the Westmoreland Hills as well as in Scotland, and on that day the attack on the abuses of the Law was renewed in this fashion.

There is another noteworthy point about this letter. It is a Law Reform pamphlet and yet readable. Alas! for our sins we have had to read a good many (and to write a few), but none but editors and such like ever do read them. There they lie on tables in club-rooms and drawing-rooms, untouched, uncut, without a mark or dog's-ear, unsoiled, except the title-page, which gets black enough from the accumulations of dust on it. A Law Reform pamphlet is notoriously at once the most unreadable and the most unsaleable production that issues from the press. Not so, however, one by Lord Brougham. We defy any well-informed man, not to

say any lawyer, to begin it without going on untiring to the end, and the best evidence of this is that the *Times* newspaper, which knows pretty well what its readers will relish, thought it advisable to transfer the whole of this Law Reform pamphlet bodily to its columns. We accept this also as a proof of the growing interest felt in Law Amendment by the general class of readers, as indeed is further shown by the constant, useful, and able articles on this subject by the most intelligent portion of the press.

The charm of this particular letter is the life and vigour which breathe in every line. In these seventy loosely printed pages Lord Brougham takes a passing glance at so many subjects, hits so many nails on the head, and shows such thorough intelligence on all points, here by a line, and there by a word, that while he interests in such matters a larger class than ever were interested before, he is still able to satisfy the better informed that he knows all that they know, and a little more.

This letter also comes very opportunely to the subject we have been discussing. The great necessity of the present time is the establishment of some department in the State which shall devote itself to the consideration of all matters relating to JUSTICE, and this letter will prove a most effective argument for the creation of such a minister. This, indeed, is probably its chief object.

Lord Brougham begins in a somewhat melancholy strain; he deplores "that errors have been committed which are not ended with the parliamentary year, but threaten worse miscarriages than those I have to complain of, and fill me with apprehension of a retrograde movement instead of the stationary condition in which the Amendment of the Law, as regards most of its branches, is now left."

We must say we do not participate in his Lordship's fears with respect to a *retrograde* movement, more especially during his life. We are rather disposed to think that this subject is getting deeply fixed in the public mind, and that it will produce a much wider action than has ever been seen before. The Amendment of the Law will soon become as popular a cry as Parliamentary Reform or Cheap Bread.

The Government cannot go on much longer on the *laissez faire*, or do-nothing principle. The people will take the matter into their own hands, and ministers will be beaten in detail on single measures as they were beaten last session by Captain Fitzroy.[1] If the calm voice of the Law Amendment Society is not listened to in time, we shall have Law Reform organisations as numerous as are the grievances of the law. Chancery Reform Associations, Debtor and Creditor Societies, Local Courts Leagues, and Associations for codifying the laws, will swarm in the land like the locusts of Egypt, and devour up what remains of the old Lady Common Law. The germs of all these exist already, and they only need the blowing of the wind in the present quarter to expand and ripen them into troublesome antagonists, who, having each some reason on his side, may make use of that to obtain a great deal that they should never have, and would not, under a better system of superintendence, be able to obtain.

The history of our recent Law Amendments is then given in a more cheerful strain.

"It may be wrong to say, nothing has been accomplished—but it is correct to say that what remains to be done is of incomparably greater importance; and moreover it is in many respects exactly what there ought to have been the least difficulty in effecting. We have amended the Bankrupt Laws: the proceedings in Equity remain to be reformed.—We have made provisions, useful, though paltry enough, to abridge the style of our statutes: we have done nothing to secure general superintendence of their structure and composition.—We have created an excellent Appellate Jurisdiction for our plantations: we have yet somewhat to improve in the Court of Review for the mother country.—We have mitigated the severity of the Criminal Code: we have given no security to the public that offenders shall be brought to justice.—We have digested the Law of Debtor and Creditor: the Law generally, and above all the Criminal Law, remains undigested, both Common and Statute.—It seems almost as if we had, not perhaps begun at

[1] On this gallant gentleman has descended the mantle of Captain Pechell, R.N., who was accustomed for many years to bring County Courts before the House of Commons, and of whom we remember hearing the present Mr. Justice Talfourd, when Serjeant Talfourd, quote in the House of Commons Lord Byron's description of Lambro—

"He only practised as a sea-attorney."

the wrong end, but certainly applied ourselves to remove the least urgent evils, and certainly chosen to attempt the things that were the most difficult, and in striving after which we were likely to be both the most reluctantly supported and the most strenuously opposed." (Pp. 7, 8.)

Lord Brougham then enters upon some of these matters in detail, and a state of things is presented which we apprehend could not exist if any department of the Government were charged with the proper consideration of such matters. He thus alludes to the Bill brought in to give increased jurisdiction and power to the Master:—

"The objections raised to this measure by Lord Cottenham, and those whom his views influenced in the Commons, were two-fold. It was said to interfere with the late orders, which it did in no manner of way; and it was said to give the Master a power uncontrolled by the Court — which is really too absurd to deserve a moment's notice; because there is provided a constant appeal, if either party is dissatisfied; because if neither appeals, it is plain that the want of control can do no possible harm; because, the control in all consent cases, and the bill was only for such, is purely nominal, sixty orders being made on these in the course of one hour.

"However, though the Government, by their law officers, took charge of my bill after it had passed through all its stages in our House without a single dissentient voice, and with the entire approval of the Ministers, it was dropped with other government measures which reached the Commons; and it adds another example to the already long list of the evils that ensue from a Government having no power to carry public measures of which they approve, and, above all, from a want of the department so often referred to, of a Minister of Justice. But this is not all, nor any thing like all. Would you believe it? — The very bill to reform Chancery proceedings in England, which was rejected, was suffered to pass for Ireland without any effectual opposition being offered! Lord Cottenham, who, with many and great merits, has the fault of believing every thing perfect in the Court where he has grown old, and whose objections proved fatal to the bill for England, allowed his colleagues to carry a bill for Ireland, consisting of the very provisions in the very words of the English bill, from which nearly the whole clauses were copied! It may naturally enough be asked, 'Was ever the like of this seen in a body affecting to

give laws to a great empire?' But the answer must be, Yes; and not only the like, but the same thing was done in the Bankruptcy Bill of last session, when the Commons rejected clauses which the Lords had sent down in the English bill, and yet inserted the self-same clauses in the Irish! The absurdities of 1850 then, altogether unsurpassed, cannot be termed unexampled. Had there been a Minister of Justice, such disgraceful things never could have happened either last year or this. At the request of the Ministers, last year, I prevented the conflict between the two Houses on the Bankruptcy Bill, and by their desire, this year, I took charge of their Irish Chancery Bill. They returned the favour by taking charge of my English Chancery Bill; but they were unable to pass through the Commons what in the Lords was easily carried.

"'Why don't you reform the Master's office?'—is a question I often hear asked. Really, when we find it impossible to carry so very moderate an amendment as the one I have been speaking of, it is a little too absurd to suppose that we should have no difficulty in new-modelling the whole of Chancery proceedings—forcing solicitors to treble their staff of clerks—and making each Master's paper as peremptory from day to day as a Judge's at Nisi Prius." (Pp. 9—11.)

Lord Brougham next presses the appointment of a Public Prosecutor, and the completion of the Digest on Criminal Law,—subjects which we have repeatedly brought before our readers. "Among the evils of our having no Minister of Justice," says Lord Brougham,—and we cordially agree with him,—"perhaps the greatest is, that we have so long lost the inestimable advantage of a Digest of our laws." (p. 18.) He then proceeds to another head, alluding to the putting the Great Seal into commission:—

"The Commission, meanwhile, was much complained of by some practitioners in the Court of Chancery, who alarmed the Ministers. That the suitors ever complained I do not believe. That they who beset the Government with their remonstrances had no desire to extinguish the Commission, but only wished to see it made more effective by supplying the absent Vice-Chancellor's place, I know. But they had forced the Ministers to apply some remedy by a loud, a somewhat importunate complaint; and those who were to afford the relief chose their own remedy. An end was put to the Commission, and Lord Truro was made Chancel-

at once — a most excellent choice, I was the first to admit. But as Mr. Baron Rolfe was an experienced Chancery practitioner, and a person of eminent judicial faculties, many expected he would have been selected, the rather as he was an old and tried political ally of the Ministers. Some gave as the reason for his being passed over that he was the fittest man for the office. Admitting fully the force of this consideration in most cases, I believe that here there was another motive at work. Among his various merits the Baron had not that of possessing any chiefship, or other place desirable to an Attorney-General: no promotion of any great account could be expected from his being made Chancellor. He remains, therefore, a distinguished ornament of the Common Law Bench. But the public has no right to complain; for certainly Lord Truro, as a judge, does very great credit to those who appointed him; and he has already shown himself, in the House of Lords, a most important ally to his colleagues." (Pp. 21, 22.)

As to this, we may be permitted to say, that, considering all the duties of the Lord Chancellor, we cannot doubt that a wise selection has been made by the Government with respect to Lord Truro. Admitting the great ability of Mr. Baron Rolfe as a Common Law Judge, it remained to be seen whether he had equal merit as an Equity Judge: nor was this made clear while he sat as a Commissioner of the Great Seal. But the Lord Chancellor is a great minister of state; on him rests the defence of the policy of the Government in the House of Lords. Both Lord Truro and Mr. Baron Rolfe have been tried in this respect in the House of Commons; and we apprehend that no one can doubt to which of them a minister would entrust the defence of a ministerial measure. Remembering what Mr. Serjeant Wilde did in the House of Commons on the few occasions in which he chose to exert himself, we shall be surprised if Lord Truro disappoints the expectations which those speeches created.

We now propose giving pretty fully Lord Brougham's views with reference to the Appellate Jurisdiction of the House of Lords, because we apprehend that no living person, from his long and varied experience, as well as advocate as judge in these Courts, has so good a right to offer an opinion on this subject; and more especially we make this extract because gross ignorance prevails on this subject. We have seen

that some persons, with this letter before them, and in the very act of noticing it, have not hesitated to state that the Lord Chancellor has been usually assisted in the House of Lords by two Law Lords, whereas the practice has been notoriously otherwise. It is true that of late years, and by mere accident, the House of Lords has been able to boast of a great legal force for its appeal business; but many of our readers will remember the time when Lord Eldon sat on appeals as the only Law Lord, when Lord Lyndhurst sat as the only Law Lord, when Lord Brougham sat as the only Law Lord: and that any other practice has been, taking this century into account, the exception and not the rule.

"It is said to be anomalous in our judicial system that appeals from all Courts — generally from the decisions of two judges, sometimes from those of four or more — should be heard in the last resort by a single person, substantially, though not in form, exercising the judicial functions of the Lords, the supreme Court of Appeal and Error.

"On this, we must first observe, that it is nothing new. It has always, or almost always, been the course of the appellate jurisdiction in this country. Lord Hardwick, and Lord Mansfield, and Lord Thurlow, and Lord Loughbourgh, all sat alone upon appeals. Lord Eldon, from 1801 to 1805, sat alone; afterwards, he had the valuable aid of Lord Redesdale. Lord Lyndhurst and myself sat, each of us alone, from 1827 to 1835. Moreover, those Chancellors had to decide on appeals from their own decrees; and some of them had to sit on Scotch appeals, without any knowledge of Scotch law. I am far from saying that these are not great anomalies — far from maintaining that a better system might not be devised. I am only stating the fact, that this has at all times been the course of the Appellate Jurisdiction in England.

"I will venture to state, secondly, that it produces very little practical mischief. Nothing can be more erroneous than the notion that the individual Law Lord who presides has the power of doing whatever he pleases, and can either show unfairness, or caprice, or impatience in the discharge of his judicial duties. An irremovable judge would have far more power and opportunity of doing so; and he may and occasionally does inflict another injury on suitors, by continuing on the Bench after nature has sounded plainly enough the signal for his retreat. But in the House of Peers the presiding Law Lord would immediately be surrounded by other members of the House, were he to give the very least

ground for suspicion that his conduct was not unexceptionable; or that, from temper, or rashness, or incapacity, he was unfit to advise the House. This was, with his wonted perspicacity, explained to the House by the Duke of Wellington; and it did so happen, as if to give forcibly a commentary on the doctrine of my illustrious friend, that the very two next days I sat, I was assisted by my friends, Lord St. Germains and Lord Wharncliffe, who, I will venture to affirm, paid as close attention to the causes before us, and had as clear and as accurate a notion of their merits, as any Law Lord who could have presided over the argument.

"As to the very plausible topic of one Judge reviewing the decision of several, it must be kept in mind that the mere rehearing of a cause, with all the experience of the former hearing, and the rehearing by a new mind being brought fresh and unprejudiced to the discussion, gives a very great security against error being persevered in, if a miscarriage has taken place below. Even the rehearing by the same Judge has this effect; and I have seen both Lord Eldon and Lord Lyndhurst in such cases abandon, the one more, the other less reluctantly, the opinion they had originally held.

"The Scotch case is perhaps the strongest to illustrate these judicial anomalies. Yet it must be observed, that some of the most important decisions on questions of mere Scotch Law — the law of real property — have been made by English Law Lords in the Court of Appeal reviewing the decrees of the Scotch Judges; and all Scotch Lawyers have long since allowed that their own Judges had mistaken their way in those cases, and that the Scotch Law was restored as pronounced by our decisions. To which I may add, that they who object to these proceedings as anomalous, and who are the first to extol those in the Judicial Committee, must recollect first, that no Judicial officer presides there; and next, that men ignorant of the various systems of Colonial Law, there sit in judgment on the decrees of experienced Colonial Lawyers." (Pp. 23–26.)

The following observations on the construction of a Court of Appeal are most valuable.

"In truth, the construction of a Court of Appeal is a work of extreme difficulty: and it is necessarily so. For in order that an Appeal-Judge may well perform his functions, he ought to sit generally in Courts of the first instance, that he may continue expert in matters of daily occurrence; and yet he ought to be often sitting in the Court of Review, in order to keep his mind unfettered by the narrower views of the inferior tribunal. Above

all, his employment must be constant and habitual, else will he inevitably lose the judicial faculties. Then if the Court of Appeal has enough business to keep it generally sitting, you cannot obtain a sufficient supply of members without robbing the Courts of primary jurisdiction; and in order to have Judges who both sit there and in the Supreme Court, you must of necessity resort to some such shift as relays, or taking five or six Judges, who at one time sit in the inferior Court, and at another time sit in the superior. But how shall these be selected? Are they to be the Puisne Judges? But these will have no weight in controlling by their revision the other Puisnes, still less the Chiefs. Are they to be the Chiefs? But this removes those great functionaries too much from their proper Courts. Are they to be partly Chiefs, partly Puisnes? Still you rob the Courts below: And then to the plan of relays, there is always the serious objection that you destroy the identity of the Court, and prevent due unity and consistency in its principles of action. As for a Great Appeal Court, composed of all the Judges, beside the objection of its numbers lessening the sense of individual responsibility, the amount of the appeal business of itself forbids any such idea being entertained. We are often referred to the French Court of Cassation — a Court of Error from all the others. But however ably it conducts its business, its construction sins against almost all the principles I have been referring to. For it consists of twenty or thirty lawyers, whose reputation, from former practice of the profession, is in many instances very moderate; and some of them have never had any judicial habits unconnected with their appellate jurisdiction." (Pp. 27, 28.)

The important subject of a division of the duties of the Great Seal could hardly escape Lord Brougham's attention. It cannot be doubted that greater difficulty attends the proper adjustment of this question than was at first expected.

"The proposition at first thought so unexceptionable, of dividing the office, and making a Chief Judge in Equity perform all the Chancellor's judicial duties, except those in the House of Lords and Privy Council — when viewed more closely is liable to serious objections. They are twofold — the necessity of providing an appeal within the Court of Chancery itself — the necessity of maintaining the importance of the Chancellor's office. First, as to the appeal in Chancery. Who is to be the Judge? The new Chief Justice in Equity will have no more weight than the new Vice-Chancellors — less weight than the ancient Master of the Rolls —

and yet the appeal is to be from them to him. Then shall he sit with two of the inferior Judges? But that will be tantamount to having the Great Seal in perpetual Commission, because there is enough of appeal business to occupy the Court all the year round. Also the Chief Judge's own decisions must be subject to review; and then the whole of the other three Courts are shut up. Lord Lyndhurst suggests, as a way out of the difficulty, that there should be no appeal from the new Chief, except to the House of Lords; and that cases of importance shall be selected and heard before the three Judges from whom the appeal is not brought. If such selection can be made, perhaps it might be used for segregating the cases most likely to be appealed, and hearing those in the first instance before three of the Equity Judges. In some such way I do not despair of an arrangement that may make the plan work.

"But the great difficulty remains untouched. What security shall we have against unfit men being placed at the head of the Law, and at the head of the Lords to preside over their appellate jurisdiction? At present no man without due qualifications dares face the Profession by sitting in the Court of Chancery, to answer the motions of the Bar, and control the decisions of the other Equity Judges. To sit in the Judicial Committee with three others, or in the House of Lords, with all the cases fully stated and sifted, and in print for months before him, asks little courage of an ambitious but incompetent man. To promote such an one to the woolsack asks little daring of an unprincipled or an easy-natured minister. Yet the Profession in all its branches will suffer from such promotion; above all, the House of Lords, mainly maintained by its judicial functions, will suffer irreparably — and the balance of the constitution may be destroyed. I confess, that however sensible I may have been of the evils arising from an overloaded Chancellor, and from a Judge of such importance holding his office during pleasure, I am not bold enough to give a decided opinion in favour of the contemplated change. Many too, Lord Lyndhurst I rather think among them, consider the labours of the Great Seal to be exaggerated, and they certainly have a right to cite the state of the business in support of this view. There has of late been no arrear save that which arose from Lord Cottenham's illness. The appointment of a Minister of Justice, who might, beside assisting in the House of Lords, preside in the Privy Council, would further relieve the Chancellor." (Pp. 31—34.)

Lord Brougham here incidentally notices another subject,

on which we shall not now dwell,—the power exercised by the Attorney General to prevent a suit being instituted where the interests of the Crown are involved. We abstain for the present from giving any opinion on this point; but it deserves, and we hope it will receive from us on a future occasion, that full consideration which its importance demands.

Lord Brougham then discusses at considerable length and with great effect the Report of the Salaries Committee, which we have made the subject of a separate article. We are happy to say that we find ourselves supported by his Lordship in the conclusions to which we have come. We cannot better finish these few remarks than by enriching our pages with the closing sentences of this letter, in which our author, we are happy to say, loses the desponding tone in which he had begun, and thus cheers and encourages the followers of the "good cause."

"If then no well-grounded fears of a retrograde movement are to be entertained, may we hope at length to see an onward progress in amending our laws, and extirpating the abuses that still remain to cripple their administration? I fondly hope we may. Let us briefly pause to consider of how noble a nature are those efforts to amend the law, which we are assiduously pressing upon the Legislature. Assuredly it can have no more imperative duty; but also, it is a duty the rigorous and successful performance of which must so certainly redound to great and lasting glory that one is astonished to witness the neglect of it. For whom do men in all ages most honour? Renowned lawgivers; and if his name is ever held in grateful remembrance, who without the embarrassment of existing but ill-contrived institutions, and the obstruction offered by long-cherished and deeply-rooted prejudices, laid the foundations of a system, how much more transcendant must be the merit, and how much more brilliant the fame of those, who, extirpating inveterate error, sweep away consecrated abuse, and dispelling pernicious obscurity, make the Law a living letter, the protection of right and the scourge of wrong—the support by a nobler than Roman charity of its parent Justice![1] These are the greatest monuments the rulers of mankind can leave behind them. When Constantine called Trajan a wall-flower, because his name as the founder was carved on so many buildings, Bacon prefers 'Adrian's view, whose

[1] A Fonte Justitia fluit jus. (*Justin. Inst.*)

mind was to wrestle a fall with time,' in repairing its ravages. Yet this, the wisest of mankind held a far less merit than forming colleges and lectures for education; and that again seemed to him as nothing, compared with 'establishing of good Laws, which makes a whole nation to be a well ordered College or Foundation.' (*Offer to King James of a Digest of the Laws.*)

"But let not our rulers and lawgivers suppose that they can reap no real satisfaction from such great works beyond the mere phantom of glory. They should feel that a more solid gratification attends the performing of acts which improve the character and better the condition of mankind. I am far from denying that the pleasure is greater to all of us, which we derive from deeds of kindness towards individuals recommended to our care by their merits and misfortunes. I am not so romantic as to place on a level with this enjoyment any that results from the discharge of public duty, because as long as men are men individual cases will ever rouse the strongest feelings. But surely we should struggle against every disposition, how natural soever, to underrate the pleasures of a larger benevolence, and should reflect how vast a service they perform, who labour to prevent those ills which all feel a happiness in relieving. They who amend our laws may most truly reap this the best reward to a kindly nature; and it is the duty of all who possess the power so to discipline their minds, that they may regard it as a most precious gratification."

On the whole consideration of this subject, we are prepared to recommend one step in advance, and but one, — THE APPOINTMENT OF A MINISTER OF JUSTICE; and we would take this as affording us the best means of finding out what others may properly be taken.

ART. X. — EMOLUMENTS OF THE LEGAL PROFESSION. — JUDGES' SALARIES.

Report from the Select Committee on Official Salaries, with the Minutes of Evidence. — 25th July, 1850.

JUSTICE, Mr. Hume observes, is more important than legislation; and hence, perhaps, it is that the great profession of the Law has in all ages led to the highest employments. This was the case in ancient Greece; and still more conspicuously so in Rome, as well under the Republic as the Empire. Accordingly, in the European states founded upon the ruins of that mighty fabric, we may perceive the same reverence for an occupation exclusively intellectual, and the same regard and consideration for that "perpetual order of men" who pursue it.[1]

In England, the lustre of the legal profession is one of the glories of the nation, and a chief cause of its prosperity. We have an excellent constitution, we abound in riches, our trade and commerce are the envy of the world; but, without justice, these advantages could not have been acquired, and when justice ceases to be well administered they will disappear.

It is right to say thus much, before proceeding to examine, as we mean to do briefly, an extraordinary production; — the Report recently published by a Committee of the Lower House on Professional Salaries and Emoluments. That Report extends to our diplomatic establishments, and indeed to all public offices held at the pleasure of the Crown; but we shall confine our attention to the *legal* part of the inquiry, which is one not a little invidious, being no other than an attempt to discover how much money is gotten per annum by the gentlemen now exercising the talents which God has given them at the English Bar.

And what, it may be asked, is the *object* of this investigation? To reduce the salaries of the Judges. And how is this to be justified? By showing that the gains of Barristers

[1] In the United States of America the Law has the same predominancy. It forms the great avenue to office. And the presidents, elected by popular, if not universal suffrage, have (from the beginning) all been lawyers, except Washington and Jackson.

are less now than heretofore, and that consequently the judicial office, even with reduced allowances, will still attract and secure men of *competent* or moderate ability.

Now we take it to be clear, that *respectable mediocrity*, however calculated to grace a useful and bustling member of parliament, is not a sufficient recommendation for the highest seat of justice. The men called, emphatically, the Queen's Judges, ought to be no common men. The country has a right, which it has hitherto exerted to see the Bench at Westminster, legal and equitable, presided over by the first order of intellect, not the second or the third; otherwise, for the sake of a paltry pecuniary saving, we shall have the most unseemly of all spectacles, a Bar full of insolence, and a Court without authority. A few instances of this sort are, perhaps, within living memory; but, in the last century, the thing was not quite uncommon. We once had a Chancellor whose tenure of place survived his faculties by several years. The leaders of his Court dictated his decrees. But we fancy there is no economist prepared to vindicate that which brought the tribunal into contempt, and placed the Government itself in peril.

But we are extremely glad to find that the incomes at the Bar are not less, but *greater*, than in any former times. Not only is there more money gained by particular individuals, but, as might naturally be expected, the good things of the profession are more widely diffused. Hear the Attorney General, now Chief Justice of the Common Pleas, who, on this interesting subject, speaks as one having authority, and not as a scribe.

Being asked to state how long he had practised at the Bar, — Sir John Jervis answered, about twenty-five or twenty-six years. The examination then proceeded as follows: —

"1699. The Committee are desirous of obtaining some information with regard to the state of the Bar now, as compared with the period to which you have alluded when you were first called to the Bar; can you give them any information with regard to the income made by professional men now, as compared with that period? — I think I can. When I was first called to the Bar, the Court of Exchequer was a close court; that is to say, practising

principally in matters of revenue; and the Plea business, being confined to a limited number of attornies, was necessarily very limited. It had likewise an Equity jurisdiction, which interfered with the exercise of the Common Law. The Court of Common Pleas was a close court in respect of the practitioners, the Serjeants of that Court. The Court of Queen's Bench was the business court, in which all the great business was done. At that time, from those causes and from others, the leading business of the Common Law Bar was confined to much fewer hands than it is now; two or three, or at most four gentlemen, being almost exclusively engaged as leading counsel in the general business of the Court. That is not so now. The Committee is aware that the Exchequer has only a Common Law jurisdiction now, the Equity being sent to the Court of Chancery. The Court of Common Pleas is an open court where all persons practise; the business, therefore, one would suppose, except from the increase of business, would be much less in the Queen's Bench than formerly, because it would naturally go, as it actually does go, to all the three Courts, the Exchequer, the Common Pleas, and the Queen's Bench; consequently there are now many more leading counsel, who may be called actual leaders by the choice of the public, than there were at the time when I was first called to the Bar, and for some years afterwards. I am certain that the income of the leaders of the Bar is now much larger than it was when I was first called to the Bar. The Committee, I presume, are directing their attention to what should be the salaries of the Judges. As I understood that I was to be examined upon that point, I have thought it right to make proper inquiries, to ascertain how I should class the leaders of the Bar, and I have put them in two classes; namely, those who are making an income above the present salary of the Chief Justice of the Queen's Bench, or an income over 8000*l.* a-year, and those who are making an income of above 5000*l.* a-year, the salary paid to the Puisne Judges.

"1700. What do you find to be the number in the first class? —I do not mention the names of the gentlemen, because, of course, it would be invidious, as it might be supposed to give those named some advantage with the public; but I have not come to this conclusion without the fullest investigation and inquiry. The result of my investigation is, that I can state that there are now at the bar eight gentlemen making above 8000*l.* a-year; and that, including those, as they should fairly be included, in the second class, because they exceed 5000*l.*, there will be three or four and twenty leaders at the bar making above 5000*l.* a-year.

"1701. Does that include the Courts of Chancery as well as the Common Law Courts? — It includes the gentlemen in Chancery as well as at the Common Law, but the large majority are those at the Common Law Bar.

"1702. Does that number include Parliamentary Counsel? — No; it does not include any of those who are properly called Parliamentary Counsel.

"1703. Can you give the Committee any information as to the proportion which the number of persons now at the Bar, making those incomes, bears to the number at the period of which you have spoken, when you were first called to the Bar? — I cannot; I may state that I know that Lord Abinger never made 20,000*l.* a-year; he told me so himself only a few weeks before his death, and I know one person at the Bar who makes more now. I am speaking now, of course, on the average. It may happen that one year a gentleman will make 20,000*l.*, and another year he may make 19,500*l.*

"1704. A witness has stated to the Committee that he believes that 11,000*l.* is the extent of the income of any gentleman now existing at the bar; how many in your opinion are making above 11,000*l.*? — From my own knowledge, I may say five.

"1705. Are those chiefly in the Common Law Courts, or in the Court of Chancery? — Chiefly in the Common Law Courts.

"1706. Has it come within your knowledge during the time that you have been at the Bar, that there has been a difficulty in obtaining from the Bar men of first-rate talent to fill the office of Puisne Judge? — That is rather a delicate question for me to answer. I know persons who have on more than one occasion refused the office of Puisne Judge, as they have themselves stated to me. Perhaps I may refer to another comparison which I have made, and which I thought would assist the Committee, inasmuch as I know that the incomes at the Bar are now larger than they have been in old times. Of the Judges now on the Bench (all of whom have been promoted during the time I have been at the Bar), I can state about the proportion who made at the Bar 5000*l.* a-year. I must again request to be allowed not to mention the names. I will take them in the several Courts. It is a matter of which I have some personal knowledge, from my general acquaintance with business, as well as from what I have collected on the subject, verified by a comparison of my own income with those of others. In the Queen's Bench there are five judges, of whom unquestionably four made more than 5000*l.* a-year at the time when

they were promoted. We know that Lord Campbell, before he ceased to be a member of the Bar, made a very large income, as much as any man at the Bar at the time. Of the five Judges of the Queen's Bench, I should certainly say that four made as much and more than 5000*l.* a-year, before they were made Judges.

" 1707. You speak of Lord Campbell when he was Attorney General? — Yes; but before he was Attorney-General he made a very large income indeed.

" 1708. Do you think that for several years previously to their accepting the office of Puisne Judge they made more than 5000*l.* a-year? — Yes; in the Court of Common Pleas, if we are to speak of several years before they were made Judges, I believe that four of the Judges were certainly making 5000*l.* a-year; but just at the time of their promotion I should say there would be three who were making above 5000*l.* a-year. In the Court of Exchequer I am certain that four, and I believe that all five, were making more than 5000*l.* a-year.

" 1709. Do you include among the five who made upwards of 5000*l.* a-year those who had been Attorney and Solicitor General? — I do; they are persons who ought to be included in the consideration of official appointments.

" 1710. Do you know any instances of gentlemen making the larger income at the Bar, which you have mentioned, who have accepted the office of Puisne Judge? — I do not.

" 1711. Do you know of any instances in which the higher departments on the Bench have been declined by gentlemen at the Bar making large incomes? — Of my own knowledge I do not. I have heard of persons who have told me themselves that they have considered whether they should take such an appointment; but that may have been simply a mode of speech. I do not know of any.

" 1712. With regard to the lower departments of the Bar, is it your opinion that the greater number of barristers practising at the Bar make a greater or a less income than they did in former days? — Incomes at the Bar now are much more divided than they were in former times. There were a few selected juniors, as there were selected leaders, in my early time. The business is now much more divided; but there are gentlemen, as we call it, behind the Bar, who are making very large incomes. In fact, I have included in my second class some gentlemen who are behind the Bar, who are making more than 5000*l.* a-year to my certain knowledge.

" 1713. Has it always been the case that there have been some

in the second class who have made above 5000*l.* a-year? — Yes, some behind the Bar.

"1714. What is, within your own knowledge, the largest income made by gentlemen practising behind the Bar? — That I could scarcely say. Mr. Vaughan Richards told me himself, that when he was behind the Bar he made 6000*l.* a-year.

"1715. Of the Judges now upon the Bench, will you state how many have been taken from gentlemen practising at the Bar who were not considered leaders? — All the Judges, with three or four exceptions, were selected from the leading members of the Bar.

"1716. Are you cognizant of the circumstances which led to the increase of the number of Judges from twelve to fifteen? — Yes.

"1717. What were they? — They were of several kinds. One was the abolition of the Welsh jurisdiction, and the necessary alteration of the Circuits consequent upon that abolition, which required additional Judges to go those Circuits which formerly were occupied by four Welsh Judges — the Chester Circuit and the North Wales Circuit, including each six Welsh counties and Chester: that was one reason; another was the increase of business that was necessarily thrown into the Superior Courts by the abolition of the Welsh Courts. They had a jurisdiction peculiar to themselves, transacting business in Banc as well as at Nisi Prius. Further, the great increase of business had occasioned large and very serious arrears, and had created the necessity for having, what is most beneficial, a Nisi Prius Court sitting concurrently with sittings in Banc; so that the extra Judge is relieving the Nisi Prius paper during a portion of the day, and discharging his duty at chambers during a portion of the day, while the other Judges are discharging their duties in Banco.

"1718. Do you recollect what the salaries of the Welsh Judges under the old system were? — Yes, perfectly; my father was one for many years. The Chief Justice of Chester had 1500*l.* a-year; the second Justice of Chester had 1250*l.*; and I think the other Judges had 1200*l.*, or something about that, ranging between 1000*l.* and 1200*l.*

"1719. Were there other emoluments attached to the office besides the salary? — Yes; the Chief Justice of Chester had considerable patronage, and the fees on suffering recoveries and levying fines, and other matters incident to the Court.

"1720. The Chief Justice of Chester had the power of practising besides? — All the Welsh Judges had the power of practising in the Courts.

"1721. Were they eligible to seats in Parliament?—Yes.

"1722. Do you think the work of the Judges, taking it as a whole, has materially increased since that period, or decreased?—It has greatly increased, and I can illustrate it in a moment. As I said before, the business of the Exchequer was confined to a particular class of revenue cases, and a few causes which the attornies having the privilege could bring into Court; and it was a familiar saying that they were like a covey of partridges in November; they were flushed directly they dropped in the field, and it was difficult to catch them to make a motion, they sat only for a short time every day; and it was the same with the Common Pleas, though not to the same extent. At present every Court is in full work, so much so, that they have arrears, notwithstanding the introduction of the bill, which authorizes them to sit in Banc during the vacation for the hearing of their arrears, and which they do continuously after each term.

"1723. Are the duties of the Judges continuous, or are they such as only press upon them at particular seasons of the year?—They are continuous. In addition to the great responsibility, the labour itself is very considerable. As an illustration, take the present term. In each Court there are three Judges sitting from ten till four, or a later hour of the day; and at night considering papers and referring to authorities to mature their judgments, or to prepare themselves for discussions coming on in matters of great importance on ensuing days. In the Court of Queen's Bench the fifth Judge is sitting to hear practice motions, and at other times he is sitting at Nisi Prius. In the Exchequer, and in the Common Pleas, the fifth Judge is sitting at Nisi Prius almost daily, and rising at three o'clock each day to go to chambers to be pestered to death with hearing interlocutory motions by attornies' clerks, which is the most laborious of all the duties of the Judges. This goes on up to the long vacation. Then the Judges, each of them, go the circuit, while other people are having their holiday; and one Judge is obliged to remain in town during that period and hear motions at chambers, even during the long vacation.

"1724. Do you apprehend that during the time you have been at the Bar, the sum total of the fees received by all the lawyers at the Bar is increased?—Greatly, in my judgment.

"1725. Is it by larger fees being given, or by an increased number of causes?—Both; I believe the fees in certain cases are larger; I am sure, from a comparison of the cause lists, that the causes are more numerous. The committee will allow me, upon this subject, to observe, that there is a considerable alteration in

the sources from whence the profits of the juniors at the Bar are now derived. When I was first at the Bar, there were a great number of motions of course, which were made by the Bar, and for which fees were paid. The Judges, by rules of Court, and otherwise, have abolished greatly that practice; they have taken upon themselves by summons to dispose of many interlocutory matters at chambers. That practice has interfered with the emoluments of some portion of the Bar, particularly with those derived from what was called the favour business conferred upon young men; but in proportion to that diminution on the one hand, the important causes and issues on the other hand have greatly increased in mercantile cases, and the fees are much larger.

"1726. Are not the fees regulated pretty much by the general wealth of the country?—In some measure they are, but also by the position and station of the members of the Bar.

"1727. Is the fee determined by the solicitor who hands the brief to the Counsel, or has the Counsel any option as to the fee?—The Counsel has no option. It is contrary, not only to the etiquette, but, I am happy to say, to the universal practice at the Bar, ever to notice or talk of fees.

"1728. It has been stated to the Committee that one reason for the salaries of the Puisne Judges being at their present rate is, that there is no prospect of promotion for the Puisne Judges to the higher offices on the Bench; is it your opinion that if those offices were considered to be open to the Puisne Judges, an obstacle would thereby be removed to a Puisne Judge accepting the office at a smaller salary than is now attached to the office?—I think not."

A notion prevails with many persons, both in and out of the Profession, that a Judge has no occasion for rhetoric or powers of exposition. All he wants, 'tis said, is knowledge and solidity. So he have plenty of ball, he has no need for powder. This is a very great error. In a certain way, a Judge incapable of expressing himself clearly is a greater nuisance than a Judge without understanding, if we could suppose such a functionary. To lay down the law distinctly is an indispensable judicial duty; to state it confusedly or obscurely, one of the greatest public evils. Accordingly, all eminent Judges have possessed in a high degree the art of statement. It was said of Lord Mansfield, that he not only satisfied the suitors, but edified his

audience. When Lord Hardwicke pronounced his decrees, the genius of justice might be presumed to preside. Why? Not solely because his law was excellent, but because the exhibition was full of dignity and even majesty; the first magistrate of the kingdom dispensing justice with an ability admitting of no rival, and with an authority and weight derived as much from the fineness of the composition and the dignity of the delivery as from the value of the matter — which indeed seems to have been always of the first order. There is not a Judge that can be named of the highest mark who was not endowed more than ordinarily with "the gift of the gab," and whose reputation is not in a great measure attributable to his talents for speaking. We know that More[1], Bacon, Somers, Nottingham, Parker, Talbot, Yorke, Murray, to say nothing of more modern examples, were all conspicuous in this way; and they are illustrations of a maxim to which there are but few exceptions, that where there is vigorous thinking there also we shall find vigorous expression. Therefore, when we see the Committee asking such a question as whether the late Mr. Preston, or Mr. Butler, the great conveyancers, would not have made good Judges, we can only say, with the greatest possible respect, that the inquiry betrays a very inadequate conception of the nature, the character, and the extent, of judicial duty. Sir John Jervis is asked, —

"1773. Do you consider that the possession of great ability in addressing a jury, or in addressing the Court, is a necessary qualification for a first-rate Judge? — It is useful in making a first-rate Judge, because a gentleman who would fail in his expression from want of a habit, and the facility of clearly communicating his ideas, would, for the same reason, not be likely to be successful in delivering clearly to a jury those rules of law which are ultimately to govern the public in their mercantile transactions.

[1] A part of the address made to Sir Thomas More on his installation into the office of Lord Chancellor may here properly be cited,— "The king hath perceived no one in his realm to be more wise in deliberating, more sincere in opening to him what he thought, *nor more eloquent to adorn the matter which he uttered*,"— as given by Mr. C. P. Cooper, in *Chancery Miscellanies*, No. III. p. 33., an agreeable work, chiefly of an antiquarian character, which we hope to see continued.

"1774. But still the style of addressing a jury, and the style of speaking from the Bench to the Bar, and to the jury, are very different in their character, are they not?—They are so far different that if you are addressing a jury upon matters of fact, of course you would reason upon those matters of fact, as an advocate being obliged to represent the sentiments of your client, in a way which may be supposed by those who do not understand professional rules to be exceeding your authority. When a Judge has to explain his view of the facts to a jury, he will, to a certain extent, but within great limits of discretion, use the same arguments; but when a Counsel is addressing the Court upon a matter of law, there is no distinction (allowing for the necessary excitement of an advocate) between the mode of delivering their propositions in point of law."

We have said that a Judge should possess powers of exposition; but it does not follow that the choice of judicial functionaries should be made from the mere *talkers* of the Profession. Sir William Grant, who had anything but the highest practice at the Bar (for he had not the ear of the attornies), became almost immediately the greatest Judge of this century—greater than Lord Eldon, as the candid now acknowledge. He was not a real property lawyer: he was not a formalist: he was not apt in the routine of Equity practice: he was of little or no use in preparing minutes of a decree.[1] The common herd of the profession did not discern his merit; but by the House of Commons it was seen and appreciated; and by Mr. Pitt, who loved merit embellished by modesty, it was rewarded. Sir William Grant, however, cannot be quoted to show that mere solidity and knowledge, without elocution, will make a first-rate or even respectable Judge. His decisions are perfect as specimens of the plain and grave style of judicial eloquence;—whether delivered off-hand or after preparation, the characteristics are the same oracular brevity, the same irresistible logic, the same propriety and felicity of expression; the same absence of levity, vanity, sarcasm, or intemperance; and the same calmness, dignity, gentleness, and gravity.

[1] We were told this by one of the most learned and accomplished members of the Equity Bar.

But, although income at the Bar is not *always* a safe test of fitness for the judicial office, it is a thing to be attended to. In general, a really good counsel will be sure to make a good Judge. And so, in general, we find that good Judges have been eminent advocates. When, in 1841, the two new Vice-Chancellors were established, the Government offered one of the appointments to Mr. Pemberton Leigh, who declined it. In selecting the next fit person, they pitched upon the gentleman of the largest practice at the Chancery Bar. We now refer to Sir James Lewis Knight Bruce, who has proved an admirable Judge; having a strong sense of duty and love of justice, and possessing this peculiarity, which distinguishes him from most other performers in his line, that he improves upon himself every year, to the great satisfaction of the Bar and the suitors. His Court is full of entertainment, as well as equity and instruction, and is quite an agreeable resort. The services of this eminent person, when the Chancery wallet rested on his almost unassisted shoulders, at a time of great pressure last summer, deserve and have secured for him the respect and gratitude of the Profession and the country.

The present salary of an English Puisne Judge is 5,000*l.* a-year. It was formerly 5,500*l.*, but was reduced in 1832. On the Circuit, says Mr. Baron Parke —

"1818. The Judges are expected, from custom, to entertain at their expense the Bar and the Magistrates; and, in the counties of York and Lancaster, also the Sheriffs and the Grand Jury. We also entertain the Bar upon every circuit, sometimes four times over; and as the Bar has increased, that expense has increased also.

"1820. That greatly augments the expenses of the Judge? — Certainly.

"1821. Would it not be possible to discontinue those entertainments on the Circuit, without any diminution of the usefulness of the Circuit?—Undoubtedly, it would be possible; but the question is, whether some of the usefulness of going the Circuit would not be taken away by that.

"1822. Will you state what advantages there are from it? — The advantages are, that we become acquainted with the gentlemen of the county, and they become acquainted with us; and sometimes

they get some information from us, and we from them. We become better acquainted with the barristers also.

"1823. Could not you give that information in your charges to the Grand Juries? — A great deal may be communicated by conversation, when you become acquainted with individuals, which could not be communicated in a charge.

"1826. Do you know the average expense of a Circuit? — No, not exactly; but I can communicate to you the expenses of my Circuits the last eight or nine years, taken altogether. The expenditure on a Circuit, including the hire of a carriage to go the Circuit, and everything connected with it, may be about 600*l.* I consider that as probably covering the expenses of the Circuit."

Therefore the expenditure here indicated being really compulsory, we are to deduct 600*l.* a-year from the Puisne Judge's salary, and then we have 4,400*l.* to maintain appearances in London, — an allowance moderate enough, we should imagine, in a country where happily a Judge is considered a great man, and looked upon with reverence. We presume such a person may occasionally entertain his friends in town as well as on the circuit. He may have a wife and family peradventure. As a wise man, unless otherwise provided, he will not spend his entire income. Considering the uncertainty of life, and the claims of those dependent on him, he ought to save 1000*l.* a-year at the least, or make good its equivalent by insurances. And this will bring him down very nearly to the level of the Scotch Judges, who are exposed to no circuit expenses, and who yet allege that with 3000*l.* a-year it is all they can do to keep their heads above water in the comparatively inexpensive circles of Edinburgh.[1]

The evidence of Lord John Russell on this subject is so important and interesting that we shall extract it fully. It will be seen that he agrees in most respects with the view we have

[1] How much the Equity Judges spend in giving entertainments to the Bar we have no means of knowing; but we take for granted a very large sum annually. Sir John Leach was extremely hospitable to the forensic body. There is a story of his saying to one of his guests (an eminent draftsman), "How do you like that soup, Mr. A.? It's much approved of *in the higher circles.*" The late amiable and excellent Vice-Chancellor of England, when he lived in Harley Street, gave regular Bar dinners some fifteen or twenty years ago.

taken. We have elsewhere extracted his opinion as to the importance of maintaining the Bar in a constitutional point of view.

We have called the particular attention of our readers to some portions of this evidence by italics.

"1337. *Chairman.*] In the exercise of the patronage of the Crown with respect to judicial officers, have you found any difficulty, with regard to the appointment of Puisne Judges, in selecting the best men at the bar to take the office of Puisne Judge?—The appointment of Puisne Judges is entirely with the Lord Chancellor; the Lord Chancellor has always been in the habit of communicating to me, in case of a vacancy, who is the person that, upon inquiry, he thought fittest for the appointment; I take that rather as a piece of information and friendly concert on his part, and I should never think of interfering with his power in that respect, unless, which has never happened, his proposal was, to my mind, very objectionable: the Lord Chancellor takes the Queen's pleasure, and he swears in the new Judge; the First Lord of the Treasury has nothing to do with it.

"1338. Does the same rule apply as to the Scotch and Irish appointments?—With regard to the Scotch appointments, when I was Secretary of State for the Home Department, I used myself generally to consider with the Lord Advocate what appointments were to be made.

"1339. *Mr. Walter.*] In the event of a separation taking place between the judicial functions of the Lord Chancellor and those which he exercises in the House of Lords, would your Lordship think it proper to continue the same patronage to the future Chancellor?—That is a question upon which I should not like hastily to give any opinion: perhaps I may as well say now, that there are two plans, differing entirely in scope, I think, which have been in contemplation by different persons, who have thought that the duties of the Lord Chancellor might be in some degree separated; the one has in view the creation of a Judge, according to a Bill that was introduced by Lord Cottenham, in 1836, I think, call him what name you please, who should sit in the Court of Chancery to dispose of the business of the Court of Chancery; and that the Lord Chancellor should remain in the House of Lords as Judge, hearing all the appeals that come to the House of Lords, and exercise, besides, all the other functions of the Lord Chancellor; the other plan, which likewise has been before the public, contem-

plates that no judicial functions should be exercised by a member of the Administration; that there should be one Judge to sit in the Court of Chancery, and that there should be another person appointed to be the head of the appeal jurisdiction in the House of Lords, and that there should be another, a third officer, *who should be called the Minister of Justice*, and who should exercise only administrative functions, and be a member of the Government; those two plans are entirely distinct in their nature; and whether the one or the other was adopted, would determine very much the sort of patronage which should be held by that member of the Government.

"1340. Mr. *Henry Drummond.*] By the second plan, might not the labours of the Secretary of State for the Home Department be very much relieved? — It is a plan upon the extent of the consequences of which I would not venture to give an opinion.

"1341. Sir *J. Trollope.*] Are the two Chief Justices and the Chief Baron appointed by the Lord Chancellor, as well as the Puisne Judges, or are they appointed by the First Lord of the Treasury? — They are questions upon which the Queen's pleasure is taken by the First Lord of the Treasury.

"1342. Mr. *Bright.*] With regard to the Judges in Ireland, by whom are they appointed?—I think the Lord Lieutenant always writes—I am not sure whether he writes an official letter, or whether he writes a private letter—but he writes a letter, upon which the Queen's pleasure is taken; in fact, the advice is really the advice of the Lord Lieutenant.

"1346. *Chairman.*] Your Lordship has stated, that the appointments of the Chiefs of the three Superior Courts in England do go through the First Lord of the Treasury; do you apprehend that if there were a reduction in the salaries of those Judges, any difficulty would arise in securing persons of the same talent that we have now to fill those offices? — Taking the salaries according to the reduction which was proposed by Lord Cottenham, and which I first proposed in a Bill, till it was suggested that it should remain for consideration, namely, that the Chief Justice of the Queen's Bench should have 8,000*l.* a-year, instead of 10,000*l.*, as fixed by law, and the Chief Baron and the Chief Justice of the Common Pleas 7,000*l.* each, I think myself that those salaries are not too much for those important offices.

"1347. It is understood with regard to the Chief Justiceship, that the common practice is that the Attorney-General of the day is looked upon as having a sort of claim upon the Chief Justiceship of the Common Pleas?—I have always understood so from Lord Cottenham.

"1348. Does that apply to the Court of Exchequer also?—According to what I have been told, it applies only strictly to the Court of Common Pleas; but no doubt it applies generally to the judicial patronage, in case of an office being vacant which the Attorney-General is well qualified to hold; but I believe he has no claim except for the Chief Justiceship of the Common Pleas.

"1349. Does your Lordship know whether it has been the common practice for the Attorney-General, or the Solicitor-General, to accept the office of Puisne Judge, or whether there have been many instances of that?—There have been some, certainly; Mr. Baron Garrow accepted the office of Puisne Judge.

"1350. Have there been any instances within your knowledge where an Attorney-General has refused a Puisne Judgeship, on account of the insufficiency of the salary?—I remember an Attorney-General who refused to be a Puisne Judge; I think it was on the ground that it was not of sufficient dignity for a person who held the office of Attorney-General.

"1351. His refusal had not reference to the emoluments of the station?—I think not.

"1352. Mr. *Bright.*] If the Attorney-General had the offer of a Puisne Judgeship, but he had at the same time the chance of obtaining a superior appointment, as one of the Chiefs of the Superior Courts, might not that be a reason why he would refuse the Puisne Judgeship, without at all implying that, except for that hope of obtaining a better appointment by waiting, he would not be well content to take the other as a permanent appointment?—That might be if there was a prospect of other promotion; at the same time I think that the opinion of the Bar, which has, of course, a great deal of influence, is against the Attorney-General taking the office of Puisne Judge; in fact, in more than one instance I have been told so.

"1353. On what ground is that opinion supposed to be formed; is it on the ground that he should aspire to something higher, or that he having chosen a political career, the Puisne Judgeships should be left to those members of the Bar who have not so chosen?—I think it is rather with reference to the importance of the office of Attorney-General than to the other consideration mentioned.

"1354. If 5,000*l.* a-year were the limit of the judicial appointments in the Superior Courts, considering the dignity which such appointments give, and the permanence also of the appointments, do you suppose that there would be any difficulty in getting men

of adequate character to fill the office of Judge?—Whether, if the Chief Justice of the Court of Queen's Bench had 5,000*l.* a-year, a person in very great practice would take that office, must depend of course upon his professional emoluments, and likewise a little upon his time of life and prospects. *As far as I have known of the Bar, I should say that a man who was in great practice would decline such an office;* the only one that I remember at this moment is Sir William Follett, who was offered a Puisne Judgeship by Lord Cottenham, and he refused it.

"1355. Mr. *Walter.*] Is it not the case that a Puisne Judgeship very seldom leads to any promotion?—Not often; sometimes it does.

"1356. Mr. *Bright.*] It is alleged that the emoluments of members of the Bar are now, and have been for some time, diminishing rather than otherwise; that being the case, and seeing, also, that their professional gains are always to some extent precarious, and that the most successful has always somebody treading closely upon his heels, and that as he passes the meridian of life his powers become impaired, and unable to sustain the enormous labour of first-class professional business; regarding all those things, is it your opinion that you could not adequately and properly fill up the appointments to the chief judicial offices if it were a rule laid down by Act of Parliament, or a rule of practice, that 5,000*l.* a-year was the limit of the salary?—I have been told that professional gains at the Bar have been diminished, but I have no knowledge of that circumstance; of course, if the emoluments at the Bar have much diminished from what they used to be, that will very much determine the question; but I do not think that a man who had the practice of Sir James Scarlett, or who had nearly that degree of practice, would take an office of 5,000*l.* a-year.

"1357. What is about the age at which Judges are appointed; are they not generally nearer 60 than 50 years of age at the time of their appointment?—I should say about 50 to 55.

"1358. They having by that time run perhaps the best part of their career at the Bar, and the office of Judge being one of great dignity, and of less destructive labour to the constitution, is it not likely that, with salaries of 5,000*l.* a-year, you could sufficiently well fill up those appointments?—I should doubt it; but, as I said before, I think the Committee should have some evidence as to what the present professional gains are: all I say is, that, as things were going on 15 years ago, I do not think you would.

"1359. Mr. *Walter.*] Does your Lordship think it necessary

that a person appointed to the office of Judge should necessarily be chosen out of the class of the most successful advocates? Is it not the fact that very excellent Judges, and even some of the most distinguished Judges, have not been men of that class? — Yes; I do not think it is necessary for the office of Puisne Judge, that a man should be at all at the head of the profession in point of practice.

"1360. Mr. *Bright.*] Would it not be generally admitted that there are men now acting as Puisne Judges who are equal in character and in legal ability, and who have as much the confidence of the profession and of the public as any men who can fill any of the higher appointments? — There certainly are men of very considerable ability and reputation as Judges.

"1361. Are there not, at the present moment, amongst the Puisne Judges men to whom, if they were raised to the Woolsack, or to the situation of Chief Justice in any of the Superior Courts, no person in the country would raise the slightest objection? — Yes, I think there are.

"1362. Then, if gentlemen possessing first-class character and qualifications have consented to take the office of Puisne Judge, with a salary of 5,000*l.* a-year, with almost no prospect of promotion, may not that be taken as a ground for believing that if the limit were 5,000*l.* a-year, the Chief Judgeships could be equally well filled up? — I think that you might have very eminent men in that way; *but I think you would be very likely to exclude from your choice the men who have the greatest practice, and that would be a misfortune.*

"1363. Is it not probable that that would only happen occasionally, and just at the moment when an advocate of that class was in the very heyday of his prosperity; and that five years afterwards, when his powers had begun to decline, but when he was perfectly competent, perhaps for twenty years to come, to fill the office of Judge, he would be willing to accept the appointment? — Yes, he might; at the same time, it would be an experiment; and I think these great appointments of Chief Justice of the Queen's Bench and the others are of so much importance, that for the sake of 3,000*l.* a-year in one instance, and 2,000*l.* in another, and 2,000*l.* in the third, *it is hardly worth while to try such an experiment.*

"1364. Does not this 3,000*l.* in the one instance, and 2,000*l.* in the others, help to maintain a very high standard of payment in almost all the departments; and if it were shown that these great

offices could be well sustained and filled at a somewhat less amount, would it not tend rather to correct an evil into which, in this country, we have been too apt to run, of extravagant expenditure in the way of public salaries?—I do not see that it would tend much to have that effect; the official salaries of persons in the Executive Government do not much resemble those in the Courts of Law; if you succeeded in what is your anticipation, it would be very well, and very satisfactory; *if, on the other hand, you had the most eminent men at the Bar refusing Judgeships, and holding a very high tone at the Bar, as compared with the Judges, that would, to a certain degree, diminish the reputation of your Courts of Justice.*

"1365. If men such as now give every satisfaction on the Bench are to be had, and have all along been had, without difficulty, at the salary of 5,000*l.*, what chance is there of the danger to which you refer in your last answer?—The men who have made very excellent Judges, and who have very much the confidence of the public as Judges, are, generally speaking, not men who have had such a great amount of practice as to induce them to refuse a Puisne Judgeship, and they might do very well as Judges; *but if the others refused, I say it would be a misfortune.* You might have very good Judges who never had had great practice at the Bar; *but a man who had great practice at the Bar would remain at the Bar, and never go upon the seat of justice.*

"1366. But so long as the appointments to the Judgeships were advantageously filled, the public could have no interest in any particular advocate going to the Bench; therefore it cannot be necessary for the public service that you should pay a higher sum to a Judge than is necessary for the office, in order to induce somebody else, who is an extraordinary advocate, to become a Judge; is not that the proper way of viewing it?—*It is a question of opinion upon which I do not agree in the view expressed in the question;* I think it is worth while for the public to pay somewhat more, in order to have a choice for the higher situations of the men who have great practice at the Bar, some of whom, as we know, for example, Lord Mansfield and Lord Ellenborough, were great men at the Bar and great men on the Bench.

"1367. Mr. *Ellice.*] Have not those great judicial officers generally, in the first place, filled the situations of Attorney and Solicitor General in this country?—I believe most of them have.

"1368. And have devoted themselves, so far, to political life in

the House of Commons, with the object of attaining to those high offices?—Yes, very commonly.

"1369. Mr. *Bright.*] Does the pursuit of a political career in the House of Commons give a man any greater power or ability to fulfil the office of Judge to the satisfaction of the country, that you should, upon that ground, because he has pursued a political career, offer him a higher prize?—No; but if he is a very great advocate at the same time, and has a very high reputation at the Bar, as well as being Attorney General, it is a reason for offering it to him.

"1370. Mr. *Ellice.*] Has it not been constantly the system and practice for the Government of this country to require the assistance of the first lawyers in the House of Commons, and afterwards to promote them to the highest situations on the Bench?—That has been the practice.

"1371. Mr. *Bright.*] When we are considering the case of the Judges, is not the first object to get the best men as Judges, at such fair remuneration as the public can be called upon to pay, without any reference to the political career of any gentleman?—Yes; but those men who have been eminent at the Bar, knowing very well the practice to be, as has been stated, that the law officers of the Crown have risen to high situations on the Bench, have very frequently come into Parliament, and, being in Parliament, have been promoted to the Bench.

"1372. Is it not rather a misfortune to the administration of justice that a political career should be the avenue to the highest seats upon the Bench; speaking without reference to particular cases, might it not fairly be concluded so?—That question is very much connected with the whole Parliamentary constitution of this country; *you do not find the only evil which one should expect, if one did not know the history of this country, might follow from it, namely, that a man who had been a strong party man in the House of Commons, who had been always defending one side, would have some traces of his political partiality when he came upon the Bench; now, notoriously that has not been the case; men of different parties who have been Chief Justices of the Queen's Bench have not shown any party bias; one may have been more for the prerogative, and another more for the liberty of the subject; but I do not think you can trace any party bias, speaking generally of the legal history of this country, in the Chief Justices of the country.*

"1373. If you can always have any number of candidates for

the office of First Lord of the Treasury, with a salary of 5,000*l.* a-year, and, generally speaking, the First Lord of the Treasury rarely shows any anxiety to leave his office, can it be necessary to give a higher sum to any functionary of the State; is there any office of higher dignity or responsibility than that of First Lord of the Treasury?—A man becomes First Lord of the Treasury having taken a great part in politics, and, generally, having no profession; he may either have a large amount of private fortune, or he may have no private fortune; but he is not pursuing a profession which brings him in a large income; and he, by taking the office of First Lord of the Treasury, rises to great political distinction. It would not be for the benefit of the country, but I have no doubt that if you took away the whole salary from the First Lord of the Treasury, you would find men of ambition who would be ready to spend their fortunes in doing the duties of the office, because it is a very great thing to be at the head of the Administration, and to direct the resources of the country: the office of the Chief Justice of the Court of Queen's Bench, I think, is totally different, because you must take a man who is making some income from his profession, *and if he is making a very large income, you will not induce him to leave the Bar for the Bench.*

"1374. If it can be shown that the inducements to men to accept the office of Judge, taking into consideration the dignity of the office, its permanence, and the remuneration attached to it, are such as to enable you to fill up those offices satisfactorily with the salary of 5,000*l.* a year, what reason can there be why a larger sum than that should be given?—*But you have not proved that you would have the field open.*"

Lord John, we are glad to see, bears his testimony against the practice of hourly warrants.

"1378. Is it in contemplation, in the reform of the Court of Chancery at this time, either to abolish or materially to alter the duties of the Masters?—I think that the duties of the office of Master require very considerable alteration, and the Lord Chancellor has been for some time turning his attention to the subject; they have a way in the Masters' offices of giving an hour to a particular business, and then, perhaps, that particular business when the hour is over is not heard again for weeks; that is a mode of doing business which seems to me extremely inconvenient; and there are certain powers that they ought to have which they have not got, and the want of which, I believe, produces great delay.

in those offices. I should think there might be very considerable reforms made in those offices; and with regard to the patronage, I should think it was better vested in the Lord Chancellor than in the First Lord of the Treasury."

We are much pleased with the whole tenor of this evidence, which is sound, judicious, and statesman-like.

It is to be observed, further, that the Judges have little or no patronage. The present Chief Justice of the Common Pleas explains this matter well: —

"1740. Is there any patronage belonging to the English Judges which may be considered as being of use to their families and relations? — *Sir John Jervis:* The Committee are aware that formerly there were many offices in the courts of law which were matters of legal sale and traffic. All those were taken away when the salaries were adjusted some time ago; but still the chiefs of the Courts have the appointments, I think, of the Masters and other officers of the Court. I doubt whether that can properly be said to be of any advantage for their families or otherwise; because we assume, and I believe correctly, that the fittest men are selected. But the Puisne Judges have nothing which can be properly called patronage. They appoint persons to perform duties resulting in pay to the persons who are so chosen. It is their duty, by Act of Parliament, to appoint revising barristers from amongst the Bar; and their practice is to take those who have been selected before; and upon a vacancy, which is very rare, they generally take a gentleman who is generally pointed out, with the concurrence of the Circuit, as being a fit person to fill the office: that can scarcely be regarded as a matter of patronage. The Judge has, in addition, the appointment of his marshal during the time he is going the Circuit. It is a pleasant thing to have an opportunity of taking the son of a friend, and of introducing him to families in the country, and giving him a trip of pleasure; but beyond that, with one or two exceptions, upon the Circuit there is very little advantage derived from that appointment. They have also, in addition to that, that which by great good fortune happens to one Judge out of ten in the lives of the whole — the appointment of Clerk of Assize, should the Clerk of Assize die during the time when the individual Judge is the chief Judge on the assize. In the exercise of that right they appoint such persons as they may deem to be fit for the office. It is a thing which nobody can calculate upon, and therefore can be no ground operating upon the

mind of anybody in accepting the office. I believe I have now mentioned every thing."

The recent noble conduct of the present Chief Justice of the Queen's Bench, respecting this office of Clerk of Assize, deserves here to be mentioned. Mr. Lowndes had for a long period served the office of Clerk of Assize on the Midland Circuit. He was a very meritorious officer, but for some years ill health had incapacitated him; and the duties of his office had been faithfully discharged by Mr. Collisson, his deputy. When Lord Campbell accepted the Chief Justiceship, it will be remembered that as he succeeded Lord Denman (who was obliged to retire from ill health), Lord Campbell took the Midland Circuit, and not the Oxford, which according to the usual professional routine he would otherwise have taken; this latter having been his own circuit when at the Bar. As it was known that Mr. Lowndes was dangerously ill at the time, the *good fortune* of the new Chief Justice was immediately noticed, that he should thus have the chance of giving away immediately that office, which, according to Sir John Jervis, "happens to one Judge out of ten in the lives of the whole." That which some Judges, it was said, had expected and even manœuvred about for many years, in order to provide for some son or relative, has fallen at once into the hands of the new Chief Justice! Poor Mr. Lowndes is dying, and if any one entertained a doubt of the result, it has vanished; the "great good fortune," to use Sir John Jervis's words, of the Chief Justice must prevail! The event proved the accuracy of the prophecy. Mr. Lowndes died. Lord Campbell was Judge of the Midland Circuit until Thursday the 13th of June, when he chose the Oxford Circuit; and Mr. Lowndes died on the preceding Tuesday! But whom did Lord Campbell appoint — some son, some nephew, some friend? None of these; but simply good Mr. Collisson, the worthy deputy of Mr. Lowndes, only because he had discharged the duties of the office satisfactorily for many years. This place, be it remembered, was a place for life, the duties of which might be performed by deputy.

Let us add a word on this as to the advantages to the legal

mind of indulging in literary pursuits, and cultivating some acquaintance with other sciences. Had Lord Campbell been promoted to his present office from the active practice of the Bar, it is possible that he might have just acted in this matter as he has done; but, fortunately for his country and legal literature, he has for a season been removed from the active practice of the Profession. He has passed this interval in the contemplation of the actions and characters of the illustrious men who have preceded him, and he is prepared to adopt as his own rule of conduct that which, to use his own words, guided Lord Mansfield. "On the day of his inauguration as Chief Justice, instead of thinking that he had won the prize of life, he considered himself as only starting in the race. The moving power which worked such marvellous effects was his earnest desire worthily to discharge the duties of his office, that he might thereby serve his country, and make his own name to be remembered and honoured."

Here, for the present, we leave this subject; but we shall probably have occasion to return to some other portions of this evidence. We are struck, throughout, by the general curiosity manifested by the members of the Committee with respect to the Profession. We are glad of this. If we cannot stand on our merits, we deserve to fall. But we would beg the members of this Committee (whose motives, doubtless, are entitled to praise) to remember, that economy in the public service may be purchased too dearly; that the Bar of England have been the safest depositories and most powerful defenders of the liberties of this country[1]; that it is highly

[1] "Bracton, who was a Judge in the reign of Henry III., and much more Fortescue, who was Chief Justice in that of Henry VI., are among the earliest authorities in favour of the liberties of the country. In the beginning of the contest with the Stuarts, the names of Coke and Selden appear with auspicious lustre on the side of freedom. In the second contest with the Stuarts, among a host of lawyers, with the venerable Serjeant Maynard at their head, appears the virtuous, the temperate, the wise, and venerated Somers. From him we pass to Lord Cowper, a Whig Chancellor, who yet opposed the Bill of Pains and Penalties against Atterbury as an unnecessary violation of justice. The next in succession as a friend to liberty is Lord Camden, who by his admirable judgments on the questions of general warrants and libels saved the country from the slavish doctrines with which it was threatened to be inundated."— *Lord J. Russell's Essay on the History of the English Government and Constitution.*

advisable to support this order in the State, by attracting the best services that can be found; that so long as *income* continues to be an object worthy of ambition in all professions, it will be sought after, and that profession or calling preferred by attaining eminence in which the largest income can be secured; and that a statesman will consider not only the Profession as it now exists, but how its ranks are to be best recruited. The Legislature may, if it so please, degrade the present members of the Bench, and baulk the fair expectations of the present Bar; but there its power ends: it cannot in the hour of need call into existence the firm and impartial Judge, the bold and experienced Advocate; still less can it surround them with that traditional respect which they have so long possessed. The public have a right to demand laws well defined, freed as far as possible from technicality, and administered purely and impartially at the least possible cost to the suitor; but, to secure these advantages, it must not grudge the successful ministers of the law the position and emoluments which are perhaps more easily obtained by the successful merchant, physician, or divine.

ART. XI. — STATE OF CRIME. — Mr. M. D. HILL'S CHARGE.

The whole country has been lately alarmed by the commission of a series of desperate offences. In different parts of the country a simultaneous attack has been made, by gangs of desperadoes, on life and property. Concert, we apprehend, is not to be dreaded to the extent of direct communication between these gangs of ruffians; but there can be no doubt that these crimes have been chiefly committed by practised offenders, associating with each other, and encouraging each other in wickedness. Are these offences an unavoidable consequence of the association of large bodies of men together? Are we to submit to such dreadful attacks? or, is

there any remedy? It is this question that Mr. M. D. Hill has boldly brought before the country in his charge as Recorder of Birmingham, on the 20th day of Oct. last, from which we shall now make some extracts. He thus gives his opinion as to the present state of crime in the country:—

"In considering whether crime is or is not on the wane, we must have regard not merely to the number of offenders, but to the intensity of their guilt. Our pockets may be picked of our handkerchiefs day after day; the reckless tradesman who hangs his goods on the outside of his shop may lose them as frequently as he deserves; and yet this multitude of offences may give a less amount of criminality than one such outrage as that which took place last week at the house of an inhabitant of this borough. Connected as I have been all my life with Birmingham, my memory furnishes me with no parallel instance of a crime so daring and flagrant, or one which must inevitably have diffused such fear (not to say terror) throughout your vast population. That one of your townsmen, roused from his sleep by the invasion of his peaceful dwelling in the dead of the night, should, when he meets with the burglars, inspire them with no alarm — *that he should be the pursued instead of the pursuer*, and should have to defend his life against their murderous violence — that all this should have occurred in the neighbourhood, if not in the presence, of the police, is a most disastrous and humiliating event — an event which imperatively calls on every man among us, who by the duties of his office or the influence of his position can aid in such a consummation, to spare no effort which may tend to restore to the inhabitants that feeling of security formerly possessed by them in a very high degree, but now so rudely shaken. We shall be reluctant to excuse ourselves on the plea, unfortunately but too well founded in fact, that at the present moment the land is rife with crimes evincing a degree of ferocity and a defiance of the law which we had fondly hoped were not characteristic of our age or country. In Surrey, the home of a clergyman has been violated and himself murdered; and in the adjoining county of Kent the houses of ten clergymen have been robbed. The importance of these offences will expand to our view when we reflect that they have been committed upon a class which both deserves and enjoys the respect and affection of the community, and which is never obnoxious to those prejudices which not unfrequently place one order of men in hostility with another. We may therefore be assured that these

offences must be the exponents of a far greater number than have ever been brought under our notice."

The learned Recorder then proceeds to inquire into the cause of the extraordinary surplus of crime, to propose a remedy, and to ask how far such remedy is supported by the present law of England.

"What has produced this sudden development of wickedness is not, as far as I know, understood. It is plain, however, that far more must be done for the repression of crime than we have hitherto accomplished, before we can reflect with any satisfaction on the results of our labours. I have so often insisted on the necessity for improvements in the moral and industrial training of the humbler classes, that I will pass by this topic on the present occasion, and invite you to consider a remedy which, though not going to the root of the disease as a rightly-conducted education might do, may nevertheless be more apt and efficient for immediate purposes. *It is notorious to all the world that a numerous class exists among us known individually to the officers of justice as persons who follow crime as a calling, and who have no other means of subsistence than the remuneration which belongs to their nefarious course of life.* For a time, not unfrequently extending over several years, they follow this calling with impunity, because no opportunity has been found to bring home to them any particular act of crime. That they must, of necessity, commit offences daily, is just as well known to the police as it is known to us that the passengers whom we meet in the streets must daily eat and drink, although we do not follow them to their homes, and are not able to aver that they have taken food of any particular kind or at any particular moment. The question for consideration is, whether the period has not arrived when the knowledge thus possessed by the officers of justice may be made available to the breaking up of those gangs which hold us in a state of miserable fear, and which by the example of their impunity obtain recruits, and spread abroad a modern pestilence. As a general principle, the law of England will not embarrass a party accused by calling upon him to answer a charge relating to more than one transaction. If it become necessary to determine the character of that transaction by inquiring into the prisoner's conduct in reference to other similar acts—as, for instance, in trials for embezzlement, or for passing false coin knowing it to be false, cases where the repetition of the act throws light on the question as to whether it was the offspring of error or design, yet

even in these cases the range of such inquiry is jealously restrained within the narrowest bounds. In trials for treason and for conspiracy the range is of necessity wider, but this laxity is practically controlled by the indisposition of courts and juries to convict a prisoner who is exposed to the hardship of having to defend himself on one and the same trial against a multiplicity of attacks. To the observance of these principles many an innocent man has probably owed his acquittal, in times when a disposition existed to pervert the powers of the law into the means of oppression; and until it can be justly assumed that such a disposition exists no longer, or is subject to some new control, it would be better to endure all the evils arising out of the state of things incident to that long impunity of offenders to which I have referred, than to draw from the scabbard a weapon which, under pretence of warring upon the guilty, might be used for the destruction of the innocent."

But is it possible to surround this remedy with such precautions as will lead to the punishment of the guilty, and leave the innocent unharmed?

"I hope," continues Mr. Hill, "I claim for those who are entrusted with the administration of the law, no more than you, in common with all candid and reflective men, will readily concede to them, when I state that their desire is to do justice, and that their failures, when failures occur, are the consequence of infirmity and not of design. It will also be admitted that from the highest among them to the lowest they exercise their functions in the full blaze of publicity. Probably, therefore, you will be of opinion that no Englishman has much cause to be afraid that he will at this day be exposed to wilful oppression in our courts. If, then, he can be secured from embarrassment in his defence, no ground will remain why we should forbear from calling on a party to defend himself against a charge arising out of a course of conduct any more than from a charge arising out of a particular act or acts. And this object, I think, may be accomplished, as I will proceed to explain. There is a statute on the books by which a reputed or suspected thief, by frequenting streets and certain places therein described which are supposed to furnish greater opportunities for plunder than others, may, if the magistrates before whom he is brought infer from such frequenting that his intent was to commit a felony, be adjudged to be a rogue, and may be punished with imprisonment. Here, then, we see that by the law of England a person, under given circumstances, may be

treated as a criminal, and deprived of his liberty without proof against him that he has committed any act which of itself is of a criminal nature. This provision, which is now nearly a century old, is no doubt a wide departure from the general principle of our jurisprudence to which I have adverted. No complaints, however, have arisen out of the exercise of this authority, open to abuse as it certainly would appear to be."

Mr. Hill then discusses the advantages and disadvantages of this law: —

"But imperfect as the provision is in its present state, it may be capable of improvements by which the defects pointed out may be removed. What I would propose is, that when by the evidence of two or more credible witnesses a jury has been satisfied that there is good ground for believing, and that the witnesses do actually believe, that the accused party is addicted to robbery or theft, so as to deserve the appellation of thief, he shall be called upon in defence to prove himself in possession of means of subsistence, lawfully obtained, either from his property, his labour, or from the assistance of his friends. On the failure of such proof, let him be adjudged a reputed thief, and put under high recognizances to be of good conduct for some limited period, or in default of responsible bail let him suffer imprisonment for the same term. And as in matters of such moment it is always advisable to proceed with great caution, I would, until the experiment has been tried and found successful, confine the operation of the law to persons who have already been convicted of a felony, or of such a misdemeanour as necessarily implies dishonesty in the guilty party, as, for instance, obtaining money or goods under false pretences. As the testimony against the accused would only amount to a presumption of guilt, so it should seem but reasonable that such testimony might be met by a counter-presumption, arising out of the fact, that his wants did not place him under any overwhelming temptation to commit the crimes in which he was supposed to be engaged. By this course of proceeding, he would be relieved from the danger of undue embarrassment in his defence. A party in the enjoyment of an honest means of subsistence can have little difficulty in proving the fact. Doubtless a law so framed would leave some thieves still at large, because it would be too much to assume that none are in the habit of stealing who have other sources of maintenance; yet it would argue very little knowledge of the predatory class not to see that such a pro-

vision would enable the ministers of justice to withdraw from society nine-tenths of the criminals who now roam at large."

Mr. Hill further states, that this remedy has frequently suggested itself in the course of a long period of his life passed in the administration of criminal law; and we all know that he has, during all this period, looked upon these matters with a view to the amelioration of the law and of society. He thus concludes his charge: —

"That bands of enemies, to whom even the laws of war are unknown, or by whom they are disregarded, should be permitted to wander from village to village, and from town to town, making no secret of their contempt for justice and its guardians, braving the opprobrium of their calling, and only refraining from the most appalling violence when they can secure their plunder without its aid — and while such bands are individually and collectively as well known to the police as to each other — is a state of things which would disgrace an age of barbarism; and which nothing but long familiarity could enable us to contemplate without horror and astonishment. Too frequently has it challenged my attention, in common with that of all others engaged in the administration of criminal justice, to leave the question of a remedy a new subject for consideration, and long before this present season of outrage, I had reduced to writing the conclusions to which my mind had arrived."

We have thought it our duty to bring this document before our readers as opening up a new view of jurisprudence. It may be possible that it is to be supported by precedent. Thus in the sister kingdom of Scotland, down to a very late period in the last century, reputed thieves might be capitally punished, and all householders were bound to return lists of all notorious persons of bad character; and what is called "habit and repute" of ill conduct is still an indictable offence *together* with any other crime. But we prefer opening this point for discussion rather on its own merits than from any analogy by which it may be supported by reference to the law of other countries. Of this we are satisfied, that it can come from no higher authority than from one whose learning, candour, and good feeling have rendered him beloved and respected throughout the Profession.

ART. XII.—THE CHANCERY REFORM ASSOCIATION.

1. *Chancery Infamy, or a Plea for an Anti-Chancery League; dedicated to all Chancery Suitors and Reformers.* By H. W. WESTON, Secretary to the Chancery Reform Association. Second Edition. Effingham Wilson, London, 1850.
2. *The Equity Jurisdiction of the Court of Chancery.* A Lecture, by WILLIAM CARPENTER. Delivered in the Theatre of the London Mechanics Institute, Southampton Buildings, Chancery Lane, September 10. 1850. By desire of the Council of the Chancery Reform Association. Effingham Wilson, London, 1850.

WE trust that none of our readers will be inclined to sneer at the pamphlets, the titles of which we have just written down, or at their authors. We do not know whether either of these gentlemen is in the legal profession; but if they showed half the zeal and information that they appear to possess, they would be well worthy of attention. We must not expect that suitors of the Court of Chancery, while hot and smarting with their wounds, are to be perfect models of good taste; and if we find, here and there, in these publications, a strong spice of exaggeration, we must not be surprised.

The existence of this association, in fact, reads us an important lesson, and realises a prophecy which we have often ventured to make. Unless Government interferes to redress the real grievances connected with the administration of the law, we shall have a clamour raised against the Legal Institutions of the country, and no one can tell the results. It is not because the vulgar modes of attracting attention are now being appealed to with reference to the abuses of the Law; it is not because we see in our thoroughfares a procession of advertising vans denouncing the Court of Chancery as the British Inquisition; or because meetings are now called

and well attended, in which inflammatory statements are made by ill-informed persons, — none of these circumstances would alarm us for the safety of these institutions. Our only grounds of fear are, that there is so much truth and justice in the complaints that are made that our Courts of Justice and our legal procedure are constantly made the instruments of gross oppression. We fear for the existence of our Legal Institutions because we, as their real and sincere friends, are not able to deny many of the charges which are made against the law and its professors; because we see that, on all other occasions, if a just ground of complaint exists, that is made the standing point on which to move all the rest. Who can doubt that this is the history of all violent changes? and why is the Law to be the exception, especially when we can point to particular branches of it for an exact illustration of this truth? We need not go beyond our present Number for an instance of this. Take the subject of what is called Tenant-Right. The only just requirements are, — an alteration in the law of fixtures, and some mode of ascertaining compensation for agricultural improvements, with an extension of the powers of tenants for life to bind the remainder-man in that respect; and yet because these just and proper points have not been attended to, the grievance-mongers have so far justice on their side; and we see that thus they have power to agitate the whole country, to convene monster meetings, to put forth the most wild and absurd political doctrines, to obtain the concurrence of multitudes in them, and, on certain points, to defy the law. Do not let us fancy that this state of things is impossible even in this country. There is a determination on the part of a large portion of the public, and of their representatives in Parliament, to have cheaper law procedure. They have the power to obtain it if they will, and that they will exercise this power was sufficiently shown in the last session of Parliament; when, in spite of the Government, and in the teeth of the lawyers, the County Courts Extension Bill was carried.

This lever of popular opinion is now to be applied to the Court of Chancery, and, apparently, by the means of this

Association. Let us give the names of the council of this new league: —

TRUSTEES.

Captain Saumarez, R.N., Fern-downs, near Wimborne, Dorset.
Captain Montague Meryweather Turner, Woodcote, and Reform Club.

COUNCIL.

Joseph Hume, Esq., M.P., Bryanston-square.
William Scholefield, Esq., M.P., Reform Club, and Birmingham.
James Wyld, Esq., M.P., 454. Strand.
Richard Maxwell Fox, Esq., M.P., 29. Haymarket.
Honourable Grantley F. Berkeley, M.P., Beacon-lodge, Hants.
Captain Saumarez, R.N., 21. Circus, Bath.
Captain Montague Meryweather Turner, Woodcote, and Reform Club.
Captain Wardell, 43. Westbourne-terrace, Hyde-park.
Meryweather Turner, Esq., Barrister, 20. King-street, St. James's.
John Stiles, Esq., Solicitor, 10. Gloucester-place, New-road.
Lieutenant George Walter, R.M., Egerton-road, Greenwich.
The Rev. James Hoyle, Shelley Rectory, Chipping Ongar.
A. Ogilvie, Esq., Surgeon, Lime-grove, Shepherd's-bush.
James Black, Esq., 12 B, Old Cavendish-street, Cavendish-square; and Shoelands, Hendon.
John Bellamy, Esq., Thickthorne, Guernsey.
M. Bewley, Esq., Petites Fontaines, Guernsey.
L. Goldsmid, Esq., 68. Charlotte-street, Portland-place.
Thomas Eyre Wyche, Esq., Solicitor, 13. George-street, Mansion House.
Malcolm Macleod Maclean, Esq., Spanish-town, Jamaica, and Old Furnival's-inn.
Alexander Warrand, Esq., Solicitor, 7. Castle-street, Holborn.
Charles Egan, Esq, Barrister, Serle's-chambers, Lincoln's-inn.
William Bland, Esq., 112. Champ Elysées, Paris.
Alfred Bate Richards, Esq., Barrister, 1. Cloisters, Temple.
Francis Place, Esq., 21. Brompton-square.
Captain J. J. Hamilton Burgoyne, Barrack Master, Weymouth.
John F. Villiers, Esq., Barrister, 7. New-square, Lincoln's-inn.

AUDITORS.

Effingham Wilson, Esq., Royal Exchange.
Edward Palmer, Esq., Change-alley.

BANKERS.

Messrs. Spooner, Attwood, and Co., Gracechurch-street.
Sir Samuel Scott, Bart., and Co., Cavendish-square.

SECRETARY.

H. W. Weston, Esq., 6. Essex-street, Strand.

ASSISTANT SECRETARY.

William Carpenter, Esq., 14. John-street, Adelphi.

Now, with the exception of the first estimable name in this list, who is favourably known to most persons who have taken any part in public affairs, we must say that we have not the honour of knowing, or even of having ever heard of, any of the gentlemen whose names we find in this list in connection with the amendment of the law: but this is the very circumstance that fills us with alarm. If a body of respectable but unknown persons associate together to accomplish the reform of the Court of Chancery, they are the exponents of a wide-spread feeling, which may develope itself to an unlimited extent. The suitors of the Court of Chancery are a scattered body; but give them some rallying point, and we do not know in what numbers they may assemble, or how powerful they may soon become. There are few persons possessed of any property in this country who have not, in some period of their lives, writhed under the powers of this Court. It has been recently said in the House of Commons[1], that as much as half the personal property of the kingdom, as well as the larger portion of the real property, are under the jurisdiction of the Court of Chancery. No one can say that he may not be within its meshes to-morrow. What, then, if a real Anti-Chancery League is to be formed, to count among its members, not only the truly oppressed and really aggrieved, but all the restless, factious, discontented spirits in the country? Is this an impossible or even improbable event? Before six months are over no event is, in our opinion, more likely to happen. The whole subject lies open to the grasp of any clever and unprincipled man or set of men. There is stock in trade for a

[1] By Mr. Turner, June 12. 1850.

first-rate agitation. Indeed, nothing prevents it or retards it but the attention which the legal authorities are now giving to the subject, and the existence of the Law Amendment Society.

As deeply interested in the latter body, it may be supposed that we feel some little jealousy of this new Institution. So far from this being the case, we are disposed to hail its existence as at once justifying the formation of that Society, establishing its utility, and as tending to swell its ranks and increase its influence.

The founders of that Society established it now nearly seven years ago, for the purpose of calmly discussing, by competent persons, the changes which were necessary in our Legal Institutions. The abuses — the grievances — were obvious enough: THE REMEDIES could only be discovered by the legal profession itself, and, to be applied successfully, must be deliberately and cautiously introduced. The great object of the Society was inquiry, by impartial and competent persons; but, to prevent professional prejudice overpowering professional knowledge, the presence and assistance of unprofessional persons were also invited. The Law Amendment Society was founded with the express object, not of promoting, but of checking, vulgar clamour against existing Legal Institutions, and providing remedies for admitted evils.

But this New Chancery Reform Association, and all similar societies, place the Law Amendment Society and its friends, perhaps in spite of themselves, in a Conservative position. We by no means desire the destruction of all existing legal institutions — no, not even of the Court of Chancery. We are for reforming the defective procedure of that Court and all other abuses of the law, or connected with the legal profession, and we have done our best to show how this can be effected; but we are not about to join in an indiscriminate attack upon that institution, or upon the legal profession; because by means of the former doubtless much justice is done and much evil prevented, and in the latter honesty and disinterestedness are to be found quite as easily as in those who revile and wish to displace them.

The lesson that we would draw from these violent denunciations of the existing legal institutions and the legal profession is, that, as a mere matter of duty and self interest, the profession is bound to amend what is amiss; and that by a timely care: for we shall place before our readers one or two specimens of what is said and spoken within the verge of the Inns of Court and the Court of Chancery itself; and when many of these statements are supported by the great authorities adduced, who is to be blamed for attending and taking part in such meetings? How can the fortress be defended when the leaders of the garrison have agreed to surrender, and even pointed out the weak places to the assailants?

Let us quote some of these expressions: —

"The Court of Chancery is universally admitted to be an instrument of the most intolerable exaction and oppression. It 'devours widows' houses,' withholds the property of the orphan, and reduces to poverty, pauperism, or the miseries of a prison, multitudes of the ten thousand who have the ill-fortune to be annually brought within its jurisdiction. No one can be found to stand forward in its defence. Its judges and officers, its solicitors and barristers, who grow wealthy by its practice, have lifted up their voices against it. Lord Chancellor Cottenham has declared that he could not wish his greatest enemy to be subjected to the tortures and harassing incidents of a chancery suit; and the Vice-Chancellor, Sir Lancelot Shadwell,[1] has spoken of its decrees going forth for 'destroying an estate according to law.' To get into Chancery is deemed one of the greatest calamities that can befal an individual; to get property out of Chancery, when it is once laid hold of by the powers of the Court, is a feat almost beyond human skill; even the residue, after the bulk of it has been eaten up by fees and costs, can seldom be recovered during the life-time of the original suitor or rightful owner." — *Address*, p. 1.

"'The present Chancellor of the Duchy of Lancaster, [Cornwall?] himself an eminent Chancery barrister, stated, in his place in the House of Commons, when urging the necessity of great Chancery reforms, that, according to the present practice of the Court, 'what might be done in an hour, occupied weeks; while the business of weeks was protracted through years.' The most simple suits, he remarked, 'emerge from the master's office only after a lapse of

[1] This was not the expression of Sir L. Shadwell, but of V. C. Knight Bruce, as cited by Mr. T. à Beckett.

years, while many of them there sleep the sleep of death, and never emerge at all.' Melancholy evidence of the mischief and misery inflicted upon society by the Court of Chancery daily presses itself upon public attention. Numerous victims linger in prisons or in workhouses, their hope of death being stronger than their expectation of justice. Poverty, pauperism, madness, suicide, are in very many cases produced by the torturing delays, the inquisitorial proceedings, and the ruinous costs of a suit in Chancery." — *Address*, p. 2.

The abolishing of the Court of Chancery is the object of this association.

"Why," says the Address, "should the Court of Chancery, an engine of oppression by far exceeding anything hitherto known, both for the number and the sufferings of its victims, still exist, as one of our great national institutions?" — P. 4.

Mr. Weston, the secretary of the institution, discourses in a similar strain: —

"After all that has been said and done with respect to Reform in the Court of Chancery, the monster evil still exists; and there is not a greater court of iniquity under the sun. The hydra-headed monster extends itself over the community; new sub-Courts are set up, new Vice-Judges are appointed, new orders and machinery are put in motion, and it lays about its hideous claws, clutching in its insatiate grasp the interests of thousands. Its myrmidons are ever on the look out, like jackalls, to obtain food for its all-devouring maw. Forty or fifty years — nay, a whole life-time, is often spent before a suit can be decided; and thousands of suitors are thus deprived of their property, and driven to prisons or workhouses, whilst *the leeches of the law not only swallow up their estates, but suck their life's blood also, and laugh and mock at those they have ensnared and ruined.* Can it be believed, that in the nineteenth century, in this boasted enlightened age, such an abomination should still, like a huge incubus, press upon society, and on all the best interests of this, the freest and most enlightened kingdom in the world?" (P. 3.)

How long, says Mr. Weston, is this system to endure?

"It will last until the people, roused to a sense of the enormity of abuses in general, and especially in the Chancery Court, shall demand that the Augean stable be thoroughly cleansed, that the

infernal system be reduced within the limits of reason and justice, and that it be no longer the legalised mode of robbing the community of their hard earnings and savings, for the sake of patronage, and the fattening of sordid and selfish lawyers.

"It can only be by bringing the evils of this Court continually before the public, and showing up its abominations, that any hope of reform can be entertained. We must agitate, agitate, till we arouse the people, and bring the Government to a sense of these abuses; a League must be formed; and such a League as injured Chancery suitors can form will surpass all former attempts at combination for obtaining a redress of grievances. It will bring forth such startling facts as will throw all the horrors of the Inquisition into the shade." (P. 4.)

Mr. Weston then details the particulars of a suit in which he was a party. After stating the filing of the bill and several supplemental bills, and the great and unnecessary expense thus occasioned, he thus continues: —

"But all the tediousness and delay that had been previously encountered sinks into insignificance, in comparison with that which now had to be undergone. The accounts comprised but about 500 items, and embraced about 3000*l.*; yet — tell it not in Gath! — it took ten lawyers, all the plaintiffs and defendants, the Master in Chancery, and all his clerks, five years to wade through it. Is it not infamous? Can any one believe that the motive is other than the spoliation of the suitors? The account, such as it is, was at last produced — unsatisfactory to all, garbled throughout, and understood by none.

"In 1846 the time for a rehearing of this great suit arrived, and all the aforesaid learned Counsel in the law were re-armed with their ponderous briefs, made weightier by the accumulated rubbish contained in the further proceedings since the previous hearing. (The whole of the papers would fill a waggon.) Again they pocketed their handsome fees, and appeared in Court before one of the Vice-Chancellors, to whom the suit had been transferred. The Master's Report was ushered in, and the Court confirmed it, making a decree that the estates should be sold to pay the costs, the balance, IF ANY, to be paid into the Bank, to await the *further directions of the Court.* The minutes of the decree, however, had to be settled by Counsel, and these worthies quarrelled over its points for nearly two years.

"Now comes the pinch. It has been asked what the costs will

be, and the moderate guess is 2500*l.** The estates were worth about 5000*l.*; so it is estimated that by the time they are sold, and the costs and expenses paid, there will be very little left. The Court, the twelve Counsel, and the ten lawyers will swallow up nearly the whole! They have taken the oyster, and they will not leave even a shell for each of the poor suitors, who must stand by and weep, whilst the vultures devour the carcase — whilst they see an insidious and jesuitical system rob them of the life-long hard earnings of an aged parent, whose dying consolation was that he had left his child and his grandchild a competence for their lives, and the division of a handsome estate amongst his great grandchildren. The suit has riven all family ties. There was no point of law in dispute; the bill was filed only for an account, and to prevent the executors from selling estates, for the purpose, as they alleged, of paying debts due from the testator, in default of sufficient personal assets. Had the legatees been attacked by robbers in the dead of night, or highwaymen on the lonely road, they might have drawn their pistols, and blown out the brains of the plunderers; nothing can annihilate such an infamous system as this, but the united force and energy of injured suitors, and the assistance of a reforming, just, and enlightened people, and their representatives." (Pp. 6, 7.)

Mr. Carpenter, the assistant secretary of the association, in his lecture, enters into the subject more elaborately, and in a more candid spirit, but falls pretty much into the same tone. He thus accounts for the existence of the Association: —

"The arcana of Chancery involve mysteries which a non-professional mind is unable to penetrate. To thread the multitudinous intricacies and penetrate the tortuous windings of that Pandemonium, demands a long life, of deep study, and a large experience within its precincts. And even having these, men often fail, and find themselves at a loss to get through its perplexing mazes. But, on the other hand, there are many who cannot describe the processes of the Court, or enumerate its forms, and rules, and orders, who, nevertheless, feel the crushing weight of its iron hand; and as well might it be said that men should not resist or overthrow a grinding despotism, unless they can correctly

* "Since the publication of the first edition, the costs have been taxed at 1,816*l.* 4*s.* 5*d.*, and it is estimated that the further costs will be 600*l.* They may be very much more than that." — *Author's Note.*

delineate the means by which it works, and enumerate the instruments it employs, as that they should not assail this many-headed and many-handed oppressor, unless they are able to track it through the multifarious and occult processes by which it destroys the peace, consumes the property, embitters the existence, and breaks the hearts of its victims. It is, in truth, to those who are uninitiated in the mysteries of Chancery processes, and unskilled in the arts by which they are directed and governed, that we must look for those expositions of their evils, and those exhibitions of their consequences, that will ultimately lead to their extinction. I will not be unjust, however, to the legal profession. Amongst the members of that body are to be found some of the brightest ornaments of our age—some of the most zealous and enlightened advocates of human amelioration and progress. We have a 'Law Amendment Society,' enumerating amongst its active members men whose names will live in the annals of legal fame in all time to come, and who deserve much from their country for the aid they have given in effecting those reforms in the civil and criminal codes which have taken place during the last thirty years. Yet it is impossible not to see that there are good reasons against leaving the reform of abuses, in the administration of Equity especially, in the hands of professional men. It is, no doubt, possible that if they had been altogether left to themselves, without any of that pressure from without that has been exercised upon them during the period I have referred to, they *might* have done all that they have done in the way of reform—though some may, and not without reason, think that questionable. Let me mention, in justification of those who doubt, a fact that has been brought under public notice by a highly respectable and respected member of the profession, Mr. Turner à Becket." (Pp. 5, 6.)

Mr. Carpenter then alludes to Mr. à Becket's useful pamphlet, "Law Reforming Difficulties," which we have long ago brought before our readers, and which pamphlet, by the way, is in itself sufficient proof that in the legal profession are to be found the most useful friends of law reform; and let us ask Mr. Carpenter to tell us one successful law reform that has not proceeded from a lawyer. A non-professional person may *abolish*, indeed, as the address of this Association proposes, but can he *create* or find a substitute for what he sets aside? This has never yet been done.

Mr. Carpenter then goes on to state what *is* the real

grievance of the Court of Chancery; and here we agree with him; but he is obliged, when he proposes any remedy, to fall back on that proposed by a lawyer, and an active member of the Law Amendment Society.

"It has been shown, beyond all contradiction, that the main cause of the delay and expense now accruing in the progress of a suit, is traceable to the practice of bringing it in the first instance before the judge, in court, who refers either the whole or a part of the matters in dispute, and involved in the suit, to the Master, to be inquired into, which matters the Master reports on — but when, or how long afterwards, no one can conjecture, with any chance of success — perhaps four, five, or six years after the decree, when the cause is again brought into court, for further directions. Mr. Commissioner Fane has thus described the process: — 'The judge, after a great expense has been incurred, and a long delay had, makes a decree; that decree tells the Master, in endless detail, what he is to do; the decree is drawn up, not by the judge, who might be thought wiser than the Master, but by a registrar, who, in teaching the Master, frequently omits some material direction; the parties then adjourn to the Master's office, and there the matter lingers, month after month, and year after year. At last the Master makes his report, tells the Court what he has found, and sometimes what he would have found, if the registrar had authorized him to do so. At last the Court either acts or sends the matter back to the Master, with new directions. And I know of nothing,' says Mr. Commissioner Fane, 'to which to compare this process, excepting the game of battledore and shuttlecock, in which the poor suitor plays the part of the shuttlecock, and is tossed from the judge to the Master, and from the Master to the judge, over and over, till the scene is closed only too often by despair, insolvency, and death.' But let us look at it a little closer. In the Common Law Courts, in a given issue to be tried, all parties are present — judge, jury, counsel, attorney, and witnesses; and the matter is then and there disposed of, subject only to a new trial, upon good cause being shown. Now it is quite true that there are *some* causes in Chancery, involving a great deal of administrative business, which could not thus at once be despatched. But it is equally true that there are many hundreds, aye, thousands, of causes taken there every year, which ought to be so despatched — suits depending on a single point of law or of fact. Why should this class of suits be impounded in the Master's office for six, or ten, or twelve years, as they often are; and some for a much

longer period? What does the delay arise from? It arises from the very clumsy and ineffective mode of proceeding, and which the Masters have not the power of amending, but of which some of them have often and loudly complained." (Pp. 12, 13.)

Mr. Commissioner Fane has repeatedly proposed a *remedy* — one, indeed, recommended also by Mr. Weston — a practice similar to that now existing in the Court of Chancery; and it must be remembered that Mr. Fane has practised many years in the Court of Chancery, and has been a good many more Commissioner of the Court of Bankruptcy, and knows both Courts well, and has no possible interest in proposing this remedy except a wish to serve the suitor. If it be said in sober sense and earnestness, as is proposed by Mr. Carpenter, that the reform of the law should not be left to lawyers, he must show that the non-professional classes can bring forward some remedial measures of their own likely to be more satisfactory than those already proposed by lawyers who have inquired into the subject. At present our hope is fixed in the law-reforming lawyers, more especially in those whose interests are *opposed* to law amendment. Indeed, we can assure Mr. Carpenter, that the difficulty is — How can a remedy be devised for the evils the existence of which all admit?

Mr. Carpenter's observations as to fees are better worth attending to: —

"The extortion of the courts of equity in the shape of fees is enormous. The number of fee-collectors is nearly a hundred; and they exact fees from the suitors to the amount of 250,000*l.* or 260,000*l.* every year. These are the tolls which the suitors pay for being permitted to enter the Court, and to pass through its avenues. No step can be taken without the payment of a fee to an officer of the Court, as well as the charges of the lawyer. In the last return made to Parliament, bearing date in March, I find the following amongst other sums received as fees by the officers of the Court: —

"In the Master's Offices - - - -	£39,396
„ Registrars' Offices - - - -	18,231
„ Affidavit Office - - - -	10,178
By the Clerk of Enrolments - - -	6,809
„ Record and Writ Clerks - -	23,239
„ Lord Chancellor's Secretary - -	3,242
„ Taxing Masters - - - -	31,781

"There is one of these items which lets us a little further into the secret of costs in Chancery,—I mean the fees received by the Taxing Masters, amounting to nearly 32,000*l.* Now, as the Taxing Master's fee is 3 per cent. upon the bills taxed, it will be seen that the taxed costs of the suitors amount to upwards of a million; and if to these we add the untaxed costs, the total will be found to exceed a million and three-quarters sterling a year." [1] (P. 24.)

The never-to-be-forgotten subject of the Chancery compensation is sure to turn up in every discussion of the abuses of the Court of Chancery.

"It would tend much towards accelerating the abolition of the fees of which I have been speaking, if the public were made familiar with the way in which they are expended. There is not only a mass of heavy salaries, amounting to about 200,000*l.*, charged upon such of them as do not immediately pass into the pockets of the officers, but there are also certain ugly-looking items under the head of "Compensation for Loss of Offices and Profits," amounting to upwards of 40,000*l.* a year, including six clerks, sworn clerks, agents to sworn clerks, waiting clerk, clerks of enrolment, deputy ditto, sixpenny writ duty receiver, bag bearer, chaff wax, sealer, Masters' junior clerks, and messenger. The enormous and flagitious job by which this charge was made upon the Suitors' Fee Fund was perpetrated by Lord Lyndhurst, in 1843. Under that act, one of these clerks receives as compensation for the loss of his office—an office in which neither skill, education, nor acquirements were necessary—no less than 5,434*l.* a-year; and he was besides appointed taxing-master, at 2,000*l.* a-year. So that for sitting in Chancery Lane five hours a-day he receives 7,434*l.* annually, and may retire when he likes with his compensation of 5,434*l.* Another person, who was merely an agent to a sworn clerk, and who, in his application to the Lord Chancellor, described himself as able neither to write nor to walk, was awarded 472*l.* a-year. Another agent got 1,778*l.* a-

[1] By another mode of estimating the costs, Mr. Challinor ("The Court of Chancery," p. 45.) makes them 1,424,400*l.* The following may be regarded as a tolerable approximation towards the amount of costs really paid by the suitors:—

Fees on *taxed* costs make them - - -	£1,059,366
Extra costs, taxed off, but paid, about - -	200,000
Bills not taxed, about - - - - -	500,000
	£1,759,366

year; and a waiting clerk 344*l.* a-year. These salaries and compensations amount altogether to upwards of 70,000*l.* a-year. But this is not all, for there is a provision in the act continuing one half of the compensation to these parties' representatives for seven years after their death, by which each will receive on an average 18,000*l.* additional. That is the way in which a portion of the fees exacted from the suitors is expended. If such things were generally known, and were generally talked about, as they would be if generally known, they could not long be preserved. It is the comparative apathy of the public which perpetuates these abuses, as it perpetuates all other abuses." (Pp. 25, 26.)

This address thus concludes: —

"Why should there not be a League or an Association to redeem the country from the curse of this monster evil? or, an Association being formed, why should it not receive the amount of public support to which its righteous object entitles it? I believe it will do so. It has been launched by men who, if not themselves victims of Chancery, have had their hearts wrung by the narratives of those who are. They ask for your co-operation. If you can give them some of your time and labour they will gladly avail themselves of it. If you cannot do that, you can subscribe towards the fund; without which they cannot prosecute their object. The evil to be overthrown is a huge one. Public opinion must be appealed to and aroused. To do this there must be meetings, publications, and various other means employed, all of which involve an outlay of money. In the trustees and council of the Chancery Reform Association you have the best guarantee for the due appropriation of your contributions; and I anticipate, with the utmost confidence, its success. Before such an amount of public opinion as you could enable it to organise, even those abuses which have existed for ages, and struck their roots into the heart and entwined themselves round the trunk of the constitution, must give way. The abuses of the Court of Chancery are of great antiquity, — they have upon them the hoary rust of time, and they are multitudinous in number; but if you will only aid us in bringing the force of public opinion to assail them, even *we* may hope to see the day when that Court, 'casting off the old and wrinkled skin of corruption, shall enter the glorious ways of truth and prosperous virtue, and become great and honourable in these latter ages." (P. 28.)

In these addresses and papers our readers will see, even

in the extracts we have made, that they are well spiced with attacks on the members of the profession. "Leeches," "blood-suckers," "cormorants," &c., &c., are names too good for the lawyers. We make great allowance for these expressions if proceeding from aggrieved suitors; and we can assure the gentlemen who use them that they will only do harm to themselves. If it were possible to dispense with lawyers altogether, they would have long since been dispensed with; but in civilised society they are a necessity; and considering the immense power given to them, and the boundless confidence which must be reposed in them, it is quite wonderful how little either the power or the confidence are abused. In all free states lawyers must abound, and must, from the nature of things, become the most important body in the country. The Association may do good, however, if, instead of making these general charges, they investigate and bring before the public any well authenticated case of fraud, injustice, or oppression perpetrated by any member of the profession, and we promise to do our best in assisting to make it known and to punish the offender. Besides this, all that can be done is to prevent, so far as it is possible, an unqualified person from obtaining any law degree (a duty now disgracefully neglected by the Inns of Court), and the promotion by the heads of the law of an honourable, kind, and charitable feeling throughout the whole profession. Let us further observe, however, that if any branch of the profession, or any of its members, neglect their duty, ESPECIALLY ANY MATTER PARTICULARLY COMMITTED TO THEIR HONOUR AND GOOD FEELING, the time is come when they will have to answer for it. The public is now about to require a rigid account of the great trust reposed in the profession, and if there is any real grievance, either affecting the public or as between one branch of the profession and the other, we may rely upon its being redressed, and that perhaps in no gentle manner.

We wish we could say that there was no ground for the existence of this Association. As it is, we trust that, as older soldiers in the cause, we may offer its members a word of advice. If we were their enemies, we would beg them to be

violent. As it is, we think they may do good if they will be reasonable and moderate. As a body of the public associated together, they may collect much useful information, and bring to light many grievous cases. But if they indulge in mere general statements, and attempt to excite an indiscriminate clamour against the Legal Institutions of the country, without proposing any distinct and effective remedies, they will only retard the cause they are anxious to assist, and incur the displeasure of all its real friends.

POSTSCRIPT.

We commence a new legal year with cheerful feelings as to the progress that the cause of Law Amendment has recently made, and the most pleasing anticipations as to the future. To those who say "who shall tell us of any good?" we would point to the County Courts as they now exist, so far as the Common Law is concerned, and to the working of the Orders in Chancery of April, 1850, on the Equity side of Westminster Hall. To the first we have devoted a separate article. On the latter we have a few words to say.

The new practice in claims under these Orders is found to be most successful in its operation. The rapidity and simplicity with which justice has in some cases been obtained by means of this form of procedure have drawn forth the commendations of a Judge by no means lavish in his eulogies of modern innovations, and whose great abilities were never shown to more advantage than in the facility with which he disposed of this new branch of business. We mean Vice-Chancellor Knight Bruce. The procedure by claim has in fact rendered the High Court of Chancery the Equity branch of the County Court. Cases of great importance may now be brought to adjudication for a very limited sum in the way of expense. When a claim is filed, it is equivalent to a rule at law to show cause why the plaintff should not have the relief which he asks. A fortnight from the issue of the writ of summons may bring the defendant to the Bar of the Court; affidavits on both sides are heard; and the decree is pronounced. The common forms of claims contained in these Orders scarcely raise a question relative to the application of the Orders, except as to the

presence of the necessary parties; the old rule of the Court, that all persons to be bound by the decree shall be present at the hearing, being to a considerable extent adhered to in claims, as well as in suits by bill. The Sixth Order, which gives the Court a discretionary power to allow a claim to be filed in special cases, has been rendered available for the decision of many controversies to which the common forms were not applicable. Equitable questions of title to real estate have thus been brought under the jurisdiction in claims. Decrees for election, for partition, and for sale have thus been obtained, and the Judges have announced from the Bench that the Orders will in all respects receive the most liberal construction. Every morning produces numerous applications at the sitting of the Court for leave to file special claims under the Sixth Order. But at present claims are not extended to injunction cases. Dispatch and economy being prominent features of the new system, it is of no small importance that the common objection as to the inferiority of the commodity supplied under such circumstances, has no place here, the Court being one of the highest rank in Westminster Hall, and its Judges selected from the foremost men of the Bar. Few legal reforms have had such great and early success.

The effect of the new practice upon the interests of the Bar has been rather different from what was expected on that subject. Though ordinary claims are not required to be signed by Counsel, they are very rarely drawn by the solicitor. The Court, however, on motions for leave to file a special claim under the Sixth Order, requires the Counsel who makes the application to certify *ore tenus* at the Bar that *he* has settled and signed the draft. But though it is customary to have the ingrossment also in Court at the time of the motion ready for the Registrar's marginal signature, this is not necessary. The Registrar's signature may be added at any time before the claim is filed.

It was at first supposed that the outer Bar would be prejudiced by the introduction of claims. But there has not yet been any sensible diminution in the number of bills filed; and in Court it is comparatively a rare thing to find a Queen's Counsel holding a brief on a claim; so many of the cases brought forward in this shape being too insignificant to bear the expense of more than one Counsel. At present, therefore, it is questionable whether the private interests of the Bar have been materially affected, while the gain and advantage to the public appear to be undoubted. One species of claim, viz. that of an executor or administrator for the

administration of the estate of a deceased testator or intestate under the orders of the Court, will probably be superseded by the provision in Mr. Turner's Act, which enables an executor or administrator to effect the same object by a motion. Great changes have thus been made, but still greater are in progress, and must, in fact, follow. Some of these may be organic.

As to what are called *the interests of the profession;* every day's experience convinces us that the wants of the profession and the public are the same, and that cheap and expeditious procedure are equally necessary to both; and what certainly does a little surprise us is, that by far the most numerous portion of the profession are *now* of this opinion.

In the infancy of a new system, it is of great importance to inquire, who the Judges are to carry it into execution; and this question, we believe, we can answer satisfactorily. We are deprived by death of the great talents, the quickness, and long experience of the late Vice-Chancellor of England. We had hoped to present to our readers some notice of the judicial qualities of this eminent person, but we must defer it. Some particulars relating to him, which may be relied on, will, however, be interesting.

The late Sir Launcelot Shadwell was born 3d May, 1779; he was the eldest son of Launcelot Shadwell, Esq., of Lincoln's Inn, an eminent conveyancer in his day (who died January, 1815). He was first sent to school at Hackney, from whence he was removed at Easter, 1792, and sent to Eton, where he remained till July, 1796. He then went to St. John's, Cambridge, and in 1800 took his B.A. degree, was seventh wrangler, and junior medallist. He was then entered of Lincoln's Inn, and was one year in his father's chambers, one year pupil to Serjeant Praed, and one year pupil to Mr. Bell, of the Chancery Bar. He was called to the Bar in Hilary term, 1803, and soon got into good business, which position he always maintained as he advanced in years. He was made King's Counsel in the long vacation, 1821; elected M.P. for Ripon, in 1826, which he continued to represent until he was made Vice-Chancellor in the long vacation, 1827. In April, 1835, he became one of the Lords Commissioners of the Great Seal with Sir C. C. Pepys, and Sir John Bernard Bosanquet; which commission continued till January, 16. 1836. On the appointment of the two new Vice-Chancellors in 1841 he became, as the senior Vice-Chancellor, Vice-Chancellor of England. In June, 1850, he was again made Lord Commissioner of the Great Seal, with Lord Langdale and Baron Rolfe, and sat once as such

Commissioner; after which he was obliged by indisposition to absent himself from Court (which he had never before done since his first elevation to the Bench) for a time; the Commission was then put an end to, and Lord Truro appointed Chancellor. The Vice-Chancellor of England never returned to take his seat on the Bench: for some weeks hopes were entertained of his recovery, but after some alternation, and rather suddenly at the last, he died at his house at Barn Elms, on the morning of the 10th of August, 1850, in the seventy-second year of his age.

The Court of Chancery is also deprived of the services of Vice-Chancellor Sir James Wigram, who has resigned his office on account of permanent bodily illness. We presume that Sir K. Bruce is now Senior Vice-Chancellor[1], and one of the vacant Vice-Chancellorships has been filled up by Mr. Baron Rolfe, whose appointment has met the universal approbation as well of the public as the profession. We cannot think the working out of the new Chancery practice can be in better hands than those of Lord Truro, Lord Chancellor; Lord Langdale, Master of the Rolls; and Sir K. Bruce, and Sir R. M. Rolfe, Vice-Chancellors. While a useful reform has thus been effected in the superior branches of the Courts of Equity (would that we could say that as effectual a reform had reached the Lower Courts, in which, alas! —

"A lower depth still opens to devour"

the suitor) all eyes are now turned to the Superior Courts of Common Law, and to the expected alterations in their procedure to be recommended by the Process and Pleading Commissioners.

The last clause of this Commission runs as follows:—"And our further will and pleasure is that you do within six months after the date of this our Commission, (13th May, 1850), OR AS SOON AS THE SAME CAN CONVENIENTLY BE DONE (using all diligence) certify to us *what you shall have done in the premises.*" So that the learned Commissioners are bound to make their Report on the 13th of November, unless they rely on the "general words" of extension. Never were so many prayers put up in King's Bench Walk for large measures of reform as have reached Heaven's Chancery within the last three months, and chiefly from the quondam opponents of all reform, who are now beginning to find out that the operation of the County Courts Act is, in the absence of some great changes, to leave the Superior Courts of Westminster high and dry, and in an interesting state of quiet and repose. We are

[1] We apprehend that the title of Vice-Chancellor *of England* will now cease, and that the Vice-Chancellors will rank only according to their seniority.

happy to hear that the Chief Justice and the Solicitor-General have attended the meetings of the Commissioners, and we are prepared to receive their recommendations with the deference which the position and abilities of the learned persons composing the Commission demand. Never was there a better opportunity of sweeping away a mass of useless technicality, and starting fair on the road of common sense; and we have reason to believe that the recommendations of the Commissioners will be conceived in the proper spirit. Large measures of reform will be proposed.

The Inns of Court in this country have made no further sign with respect to legal education; but we are happy to say that the King's Inns in Dublin, which very much resemble our own institutions, have made a considerable step in advance. In addition to the lectures of the two professors of Trinity College, Dr. Longfield and Dr. Anster, the benchers of the Queen's Inns have appointed two other law professors. All law students, graduates of Oxford, Cambridge, Dublin, or London, must attend, previous to being called, two complete courses of these lectures, viz. one complete course of any two of the above professors' lectures, and at least five-sixths of the lectures of each session or university term. All students, not graduates of the above universities, must attend four courses, one of each of the above professors appointed by the benchers, in such a manner as that each non-graduate must be engaged three years in the study of the law in Ireland, exclusive of the two years required in England. Thus we find that Ireland is to teach us our duty in this point as in others connected with law reform.

We are glad to be informed that the proposed Law School, to be established by the Law Amendment Society, has engaged much of the attention of the committee appointed to take the necessary steps in its behalf, and that considerable progress has been made. We understand that, in addition to the Lecturers already appointed, to whom we referred in our last number (12 L. R. p. 429.), six or seven others have tendered their services to the Committee, which have been accepted. Under these circumstances it has been thought advisable to defer the commencement of any of the proposed lectures until January next, as a more complete scheme, embracing the whole range of the Law, will be then brought before the public. The Second Report of the Committee on the Law School will be brought before the Society at its first meeting on the 11th of November.

Oct. 29. 1850.

THE

LAW REVIEW.

ART. I.—HISTORY OF THE NEW YORK CODE AND ITS APPLICABILITY TO THIS COUNTRY.

1. *State of New York. In Assembly, March* 2. 1842. *Report in part of the Committee on the Judiciary in relation to the Administration of Justice.*

2. *What shall be done with the Practice of the Courts? Shall it be wholly Reformed?* Questions addressed to Lawyers. By DAVID DUDLEY FIELD. New York: John S. Voorhies. 1847.

3. *Hunt's Merchants' Magazine for July*, 1850. New York.

4. *The Monthly Law Reporter.* New Series, Vol. 3. No. 3. Edited by STEPHEN H. PHILLIPS, July, 1850. Boston.

5. *The Code of Procedure and a Supplementary Act, as Amended 11th April*, 1849, *with a Table of Contents.* By a Member of the NEW YORK BAR. New York: Voorhies. 1849. pp. 56.

6. *The anomalous Condition of English Jurisprudence, considered with Special Reference to a proposed Fusion of Law and Equity.* By CHARLES FRANCIS TROWER, Barrister at Law, Late Fellow of Exeter College, and Vimerian Law Scholar. Oxford: T. Hatchard. 1851.

7. *Letter to Lord Campbell, Lord Chief Justice of England, on the Reform in the Common Law.* By Sir ERSKINE PERRY, Chief Justice of Her Majesty's Supreme Court, Bengal. Ridgway. 1850.

THE Civil Code of New York, of which we have recently given a somewhat extended notice[1], accompanied as it has

[1] 12 L. R. 366—398. and *antè*, pp. *65*—87.

been by the explanatory statement of Mr. Dudley Field[1], whose labours in this cause we have already made known to our readers[2], has attracted so much attention, that we shall endeavour to give a more detailed account of the steps by which the great change involved in this Code has been accomplished; and, in doing this, we shall read a lesson to our legislature as to the proper course of proceeding, if they wish to effect a similar reform. For this purpose we shall freely avail ourselves of the materials which we have placed at the head of this Paper, and more especially of the Article in Hunt's Magazine, and some other information which has been communicated to us on the subject. "The sensation," to use a common phrase, created by the conversation which took place on the subject at the Law Amendment Society on the 18th of November last, has exceeded any thing that we remember connected with the amendment of the Law: and we are much mistaken if the results of the whole movement are not as lasting as they will prove to be important. We do not wish to be guilty of any exaggeration when we say that the public mind was in that peculiar state which often precedes the arrival of some great intelligence. We were all expecting some vast change, — some event that would satisfy that anxious yearning after truth which has been felt far and near. This void has now been filled up. We feel that, in the New York Code, a great blow has been struck; it may be for the human race, but more especially for the Anglo-Saxon sept, whether they inhabit the Old or the New World.

It cannot be doubted, by any one acquainted with the two countries, that more attention has been paid of late years by the public at large in the United States to law and all matters connected with it, than in what we cannot help calling the "mother country." In the former the practice of the law is the great avenue to almost every distinction in the country, as well political as professional. With us it forms only one among many. It is not surprising, therefore, that in the United States this profession absorbs so large a portion

[1] On the 18th of November, at the rooms of the Law Amendment Society.
[2] 8 L. R. 387.

of the whole intelligence and energy of the population. With us law, even its very name, is distasteful to all but the mere lawyer, and even the slave of the profession usually busies himself with that portion of it which will bring him his income, and looks no further. Working in the mine, having bade adieu to the light of the sun, he sweats and drudges; and, if he can secure the prescribed amount of ore, he thinks that this is happiness, and dies content. Not so our American cousins. They have recently awakened to a different feeling. That which is a sentiment here with a few — lawyers and others, has become with them a fixed determination of popular will. Without resorting to vulgar arts, the law reformers of New York and other States have been able to excite the sympathy of the great body of their fellow citizens, who have shown in this matter an intelligence[1] far greater than anything that our citizens have as yet displayed. This seems now universally admitted. Let us then endeavour to trace the steps by which a result so desirable has been brought about; and we shall be excused if we limit this inquiry, on the present occasion, to New York, by most admitted to be not only the first of all the States in wealth, in population, in enterprise, and in social progress, but as containing within it the most varied and distinct interests.[2] In this State the

[1] It must not be supposed that this feeling was a hasty one; the citizen of New York had a particular reverence for the law. "Is it not true that the respect of the Americans for law — their loyalty, to use a more expressive term — is equal to that of any nation? Our legislators talk and wrangle, yet how rarely do they disturb any of the principles of jurisprudence? and certainly nowhere is there less disposition to interfere with the proceedings of the Courts. The extreme Radicalism of America has resulted in an excessive conservatism upon this one point — in a strong desire to uphold what seems to be the only permanent institution of this grand age of progress."— *M. Law Reporter*, for July, 1850, p. 110.

[2] Let us take as a witness of this a highly respectable legal publication published at Boston. "We are free to say, notwithstanding all local affinities, that the State of New York must be recognised as the truest type of the American State. Whether because on account of its size it controuls every national movement, or because of its commercial advantages, the commercial pulsations are regulated by what constitutes in fact the heart of the whole system, it is certainly true that in commercial enterprise, in political affairs, and *in jurisprudence*, the policy of New York has been always found consistent with the general policy of the Union. Perhaps it leads — perhaps it seems to lead, be-

evils of an ill-defined, uncertain, and defective system of rights and remedies, embarrassed her citizens at every point in their pursuits. Of these circumstances her people were feelingly conscious; and every sort of proposition for their modification or amelioration was made. Thus New York, from position as well as interest, became the leader in this experiment.

Years were required to mature this position. Since the peace of 1815, so great had been the progress of industry and the increase of the wealth of New York, so much had the sources of litigation been multiplied, that the business of the courts had increased far beyond their power to transact it. The cause-lists had gone on swelling every year. For the previous fifteen years scarcely a session of the legislature had passed without some propositions to relieve the multitude of suitors who crowded the avenues to the courts with suits which the judges, and more especially the chancery judges, could not hear; propositions generally rejected, sometimes adopted, and always found in the end inadequate. A new constitution went into effect on the 1st of January, 1823. It was then supposed that, by the wise and provident policy of the convention, which had remodelled the courts and established a new system, it had secured a just and speedy administration of justice for future times. Notwithstanding these expectations, that constitution had scarcely come into complete operation; and, so early as the year 1825, when it began to be suspected that the new condition was as bad as the old, — that the remedies had only changed the seat of the disease, not removed it, — and in that year an inquiry was ordered by the Senate, and the matter was referred to the chancellor and the judges. "*They recommended some changes in details, and in the practice of the courts, most of which were made. The subject was often afterwards debated, and the inquiry repeated by the Senate and Assembly in the years* 1835—38. *But all these debates and inquiries ended in nothing.*"

So far it might be supposed that we were quoting from

cause it is always sure to follow'—but it almost always happens that the policy and purpose of New York recommends itself to the American people."— *Law Reporter*, for July, 1850, p. 112.

some English periodical, and not from Hunt's Magazine. But a spirit was abroad that could not be laid, and this was embodied, as often happens, in one man whose energy called up a corresponding feeling in many, and, while it roused and sustained the wishes of others, led them on to a point on which they could act effectually. Mr. Dudley Field thus spoke out in a remarkable pamphlet[1] published about this time.

"The reform of our judicial system will be the most important question of the next session of the Legislature. There may be other questions more popular in their nature, which will engross, for the time, more of the public attention; but there will be none whose real and permanent consequence is comparable to this, in its relation to the order, the peace, and the sound moral sentiment of society."

Thus it began, and one would think it was addressed to a member of our own House of Commons, and referred to the session of parliament about to commence in February, 1851.

The second paragraph thus commenced:—

"The judicial system which prevails in this State, has come now to be so inefficient for good, and so productive of evil, that some remedy is indispensable. The first step towards an efficient remedy of the intolerable evils under which we now suffer, seems to me to be a simple amendment of the constitution of the State removing the present restrictions upon the legislative power, so that it may re-organise the courts now and hereafter, according to the wants of the people."

Here let us be thankful that, in our own country, there is no such obstacle in the way of a complete reform. If the *will* exist in the legislature, they have the power to do what may seem to them to be right.

In 1842 the subject of Judicial Reform was again brought before the legislature of the State, and a committee of the assembly made the Report thereon, the title of which we have given above. This is an interesting document, as it presents a view of the remedies which were proposed at the time. The recommendation of the committee, which was,

[1] Letter to Gulian C. Ver Plank, on the Reform of the Judicial System of this State. By a Member of the New York Bar. New York: 1840.

doubtless, to a considerable extent, the opinion of the public at the time, is in these words: —

"Your Committee purpose, not only to remove the causes which have led to the present difficulties, but to prevent their recurrence, *by calling to their aid the whole effective power of the legal profession;* and thus, by making it their direct interest to use the fewest words possible, to obtain the end desired. Hence, they have made the costs, as between party and party, and which will often, but not always, be the measure of the attorney's fees, to depend *upon the result obtained, and not on the amount of labour* by which it is accomplished. They have also impressed into the same service, to accomplish the same object, the whole body of parties litigant, *by holding out inducements to them to proffer to their opponents fair and reasonable terms of adjustment, and even of compromise.*"

It is important to observe that this is also the view taken by the great organ of public opinion, which has had so leading a part in bringing the labours of Mr. Field into public notice. In one of the early articles on this subject, the *Times* has clearly pointed out the importance of inducing the legal profession in this country to undertake the reform of the law.

"We have of late often said that the true interests of the public and of the legal profession are identical, and that, in order to render our attempts to effect a reform in the law successful, *we must induce lawyers to become reformers.* * * * In the minds of our people generally, the feelings that must arise [with respect to the New York Code], are admiration and envy. Hope, however, ought to cheer us; for what a kindred people has thus happily and early brought about, we surely can also achieve: and that height of generosity and degree of enlightenment which the lawyers of the State of New York have reached, cannot, we hope, be deemed beyond the attainment, or beside the wish of their professional brethren in this country."—*Times*, Nov. 30. 1850.

The Committee of the New York Assembly, also, seem to have been aware how vain it is for a legislature to attempt a war with a skilful and acute profession on the subject of fees.

"We find," they say, "that the Legislature have repeatedly enacted laws, having for their object to lessen the expense of

litigation and the fees of lawyers. While they have thus waged hostility against the effect, they seem rarely to have looked back to causes, and leaving the surer influences at work, they have in a few years found these laws *in effect repealed by ingenious construction and new services invented;* and a large amount of compensation has been rendered necessary by a great, but much of it useless, amount of services rendered."

These sentences prove that the Committee appreciated the real difficulties of the subject, and strictly apply to our own case in this country. So long as the remuneration of the lawyer is made to depend on the length of the document, so long will there be a large portion of the profession opposed to changes which diminish the length of the document; but alter this rule,—and alter it, we say, at all hazards,—and this great (and, to some extent, just) cause of opposition ceases. The reformers of New York were wiser than the House of Commons of 1850, which declined to proceed with a bill, which had passed the House of Lords, for establishing a more sensible principle of remuneration; and, marvellous to state, but unfortunately true, the attornies of London, with the Incorporated Law Society at their head, petitioned against this bill!

Such, then, were the views of the Committee of the New York Assembly in 1842. Such were the limited reforms which they chiefly proposed at that time. If we compare this with what has since actually been done, how vast is the distance between their views and the present advanced state of things! A close scrutiny of the Report does not enable us to detect the existence of even a lurking idea, in the minds of the Committee, that the system of procedure now in force in this State would ever be tolerated, or that its existence could be anything less than visionary. Strange as it may appear, this very Report is accompanied by an appendix, which was attached by the Committee, and which contains the leading principles of the new system. The Committee, however, could not concur in these principles, or recommend the passage of the bills containing them.

"The learned author of the bills in question," say the Committee, "David Dudley Field, of the city of New York, has, with

great pains and labour, collected a large fund of information on the subject; and the Committee deem it due to him, to the public, and to themselves, to recommend that the bills of Mr. Field, together with his explanatory letter in relation thereto, which has been recently laid before them, *but which they have not had time properly to examine*, should be printed as an appendix to the report."

The Report of the Committee, and the bill which they *did* recommend, have proved of no avail; but the principles of the appendix have become, to a great extent, the law of the State.

The Committee, however, did not proceed unfairly. They "damned with faint praise;" but they printed all that was necessary to be known, and, so far, we are thankful to them. They scattered the seed, perhaps, with unwilling hands, which was afterwards to fructify so amazingly. We believe that the time is not far distant when a similar result will, in our own country, attend the labours of some of our own commissioners; when the Appendix will be preferred to the Report; when Parliament will consider not how little may possibly be conceded, but how large a measure of reform may safely be granted. Mr. Field has lived to see the day when his recommendations, though rejected by the Committee, were adopted by the Assembly: he has found that, once enunciated, his principles have made way with the thinking and intelligent portion of his profession; and that though the few might sneer and hesitate, the many insisted on acting upon them. He has lived to see his views, thus sent forth with manifest disaffection, become the law of a great portion of his native country[1]; and to find State after State in the Union demanding the same benefit: and he will live to see, if we mistake not, nation after nation asserting their right to a

[1] Mr. Field is, we believe, a native of Massachusetts, where he was brought up. This circumstance increased the difficulty which he had in enforcing his views, as there is much jealousy felt by the natives of one State attempting *to lay down the law* for those of another. It is to be remembered also that although in familiar parlance all Americans are with us called *Yankees*, yet among Americans this nickname is confined to the natives of Massachusetts, Maine, and Connecticut, and is not given to the natives of New York. This fact, although it appears trifling, has been a considerable difficulty in the way of the complete adoption of the Code by the New Yorkers, who are not Yankees.

similar boon. In the letter printed by the Committee Mr. Field brought forward the views which he entertained in plain and unadorned language, but with a truth and earnestness that brought them home to many minds. There was nothing wild or visionary in his propositions; they contained a practical statement of the whole subject. He considered the difficulties he had to encounter; he stated what might fairly be hoped for, and what was not to be expected. "He will prove himself a visionary legislator who shall set to work with the notion that every thing should be perfect. There will never be an administration of the law without delay and without expense." These were his words.

It must not be supposed that all this time Mr. Field had no opponents. After stating the evils of the existing system, he says —

"And yet there are persons who think that no change is wanted. There will always be some men, the foes of all innovation, to stand up in defence of any thing as it is, to dispute every inch of ground with the advocates of change; *and foremost among them are generally some whose profession has made them most familiar with the existing system.* It is hard" he continues, "to forget the lesson which we have repeated daily for half our lives, however difficult it was to learn at first, and, perhaps, the harder the more difficult were the first lessons. We love to repeat the mental processes to which we are accustomed. The lawyer's studies, moreover, lean rather to laws as they are, than laws as they ought to be. It is his profession to understand them with all their inconsistencies, their verbal distinctions, their scholastic refinements—not to make them. *By an easy process he comes to regard the arbitrary rules, for which he daily reasons, as natural and true.*

"It is natural, then, that there should be many of the legal profession, and those, too, among the closest of its students, and the most successful of its practisers, who set themselves against all innovation. They may be men of the purest character, and the profoundest learning. They obey the laws of their minds. They cannot act as the expounders of one system and be the advocates of another. They find it difficult to conform to a rule, and to see, nevertheless, that the rule is wrong.

"How many men are there of the older members of that profession, who did not dislike the abolition of fictions in the action

of ejectment.[1] The men of straw, in whose names the controversy was carried on—the casual ejector and the like—had taken possession of their imaginations, and they parted from them, as from real entities whose presence was essential to justice. A few years have changed all this; and they would now, doubtless, be very sorry to own their former partiality for these solemn fictions.

"These champions of things as they are do, however, by no means represent the majority of the profession; with the larger body of lawyers, the opinion is very prevalent,—an opinion that gains ground every day,—*that the present system is unreasonably arbitrary, dilatory, and expensive.* While I am on this subject, let me say that I think injustice has been done to the great body of the profession. There have been constant efforts at reform, directed rather against their own emoluments, than at the system. They are asked to co-operate in a plan, which they could not approve, of cutting off a part of their remuneration, without diminishing their labour. It was not often that a lawyer was overpaid for what he had to do. The true reform was to diminish the labour, and the compensation along with it. On the contrary, there seems often to have been a disposition to force them to do more work, and to take less for it. If they have not joined in this scheme, let it not be attributed to ignorance of the defects of our present system, or to any wish to profit by, or to perpetuate, its abuses."

All this is exceedingly applicable to the state of the profession on this side of the Atlantic. The really eminent men in both branches of the profession are now almost all law-reformers; but there is, we fear, a strong party who would willingly let things go on as heretofore; and there are many who think that they shall be ruined under a new system. We were met the other day by a worthy barrister, who, knowing our sympathy for law amendment, asked us, with a grave face, whether we were going to take away his children's bread! We need not say how groundless, in our opinion, are these fears. But if they are sincere they are a subject of true sympathy.

In a former letter, in 1837, Mr. Field had aimed, as we

[1] Let it be remembered that an eminent conveyancer of Lincoln's Inn mourned over the fate of common recoveries, and there are still some who lament over terms to attend the inheritance!

have already mentioned, rather to arouse the public to an effort to remove the obstacles in the way of judicial reform. On this occasion he had greatly advanced from his previous position, and he urges the legislature to secure the reforms which are needed and distinctly stated. His words are these: —

"There are, indeed, two sources from which spring most of the evils of the system as it stands. First, the forms and proceedings before the courts, and secondly, the organization of the courts themselves. For the latter, a remedy is in prospect, through an amendment of the constitution. My observations, therefore, shall be directed only to the forms and proceedings before the courts. In what I have to say, I shall confine myself to the proceedings in ordinary actions, purposely omitting the proceedings in special cases. When any real reform is effected in the ordinary actions, it will be time enough to look after the special cases. If that time ever comes, I hope we shall have a code of practice for all cases, civil and criminal; nor do I doubt that one could be framed."

In this instance, the subject of codification was distinctly alluded to, but in such words as would lead any one to suppose that it was then regarded as an almost hopeless anticipation. "If that time ever comes," was the language of Mr. Field in 1842, and yet in scarcely seven years a Code of Procedure is reported complete to the legislature, much of which was the work of Mr. Field's hand. The distinct propositions of reform urged by Mr. Field at this time we shall now notice. But let the reader here bear in mind that the juridical system of New York was then almost precisely what it is now in this country. New York has always been peculiarly English in habits, feeling, and sentiment. It clung with fondness even to the most crazy parts of the old legal edifice established in that State as part of our old Common Law. A Lord Chancellor and eight Vice-Chancellors existed. All the misdeeds of our Norman ancestors had been perpetuated there. While other States in the Union never had the English procedure, or had abolished it, in New York it had been tolerated. Forms of actions still existed, except that in some wild hour the Assembly had abolished the

action of ejectment! Law and Equity were administered in distinct Courts by different judges.

These were Mr. Field's propositions: —

"It is proposed that the complaint (the declaration) shall set forth briefly, in ordinary language, and without repetition, the nature and particulars of the cause of action; and that the plaintiff, or his attorney, *shall make oath to his belief of its truth.* To this the defendant is to put in his answer, setting forth briefly, and in ordinary language, and without repetition, the nature and particulars of his defence, to be verified in the same way."

He also proposed an amalgamation of procedure in suits at Law and in Equity.

The reception which these proposed changes met at this time from the public is very exactly expressed by their author, in another part of the same letter. We cannot refrain from quoting it, as evidence relating to the progress of public opinion, and as showing the bold and decisive manner in which Mr. Field stood forth, almost single-handed, to advocate this great legal revolution: —

"Such are the changes," he writes, "which I would recommend in the practice of the Courts of Common Law. I do not flatter myself that they will meet at first with much favour. The changes are radical, and that is a decisive objection with many. They will overturn nearly the whole of the technical part of our system; a part which has decided and zealous advocates. It will wound the self-love of many, because it will render useless a part of their present skill, and destroy the advantage which that gives them. With all these discouragements, I am convinced that something like the plan I propose will, sooner or later, be adopted. The present system cannot last."

It is a striking circumstance, indicative of the backwardness of public opinion on this subject at that time, that the chairman of the committee, by whom this report was made in the Legislature, Mr. Loomis, was afterwards one of the Commissioners to prepare the Code of Procedure, and united to frame it upon the basis of the very principles contained in the plans given in the appendix to his report.

Such was the state of this great movement at the close of the spring of 1842.

"It is but justice to say," says the writer in Hunt's Magazine, "that at that period, there was no man in the State known as so earnest and so persevering a champion of judicial reform as Mr. Field. He was at that time the only man in the State who had pointed out repeatedly, and in a clear and powerful manner, the only sound principles upon which a legal reform could be made. Had his suggestions then been presented for a decision by the people, 5,000 votes could not have been obtained for them among a half-million of voters; and there were not a half-dozen presses among the 300 and upwards then in the State, that boldly advocated his views, in all their length and breadth."

In the summer of 1842 the people of the State of New York, in a formal manner, expressed their desire for a convention, to alter, or make anew, the constitution of the State. It is one of the features of the system of government in New York, that whenever any evils arise, whether in consequence of the time that may have elapsed since their formation, or in consequence of the ever-varying aspect of habits and customs in this young nation, then the people can assemble in council, and amend or renew, in a peaceful and amicable manner, these great and fundamental charters of social liberty. The convention, which had been thus called, assembled in July, 1846, and adjourned on the 9th of October following. An entirely new draft of a constitution had been proposed, and was submitted to the citizens, and adopted by them, with an immense majority, in the November following. It went into effect on the 1st of January, 1847. Thus, in less than six months, had a new system of government been proposed, adopted, and established. Neither were the judicial reforms lost sight of in that instrument. Public opinion had been steadily advancing on this subject, and previous to the assembling of the Convention, the press of the State had published many articles in relation to the re-organisation of the judiciary. A brief notice of some of these will furnish us with the best evidence of the state of public opinion on this subject with the warmest advocates of reform. Among them was a series from the pen of Mr. Field, who had shown himself, from the first, to be the most vigilant champion of this

cause. To these we shall refer, as best adapted to our purpose. The first article thus commences: —

"The re-organisation of our judicial establishment is one of the first objects to be effected by the approaching convention. It would be an idle waste of time now to explain the reasons that have made this necessary, further than to point out some errors which may be avoided hereafter. Suffice it to say, that the present system has become so inadequate to the ends for which it was created, so burdensome to the suitor and the state, so fruitful of expense and delays, that the necessity for its reconstruction is apparent to everybody, and it only remains for the people to agree upon something better to put in its place. What this shall be, is a matter of the highest concern to us all. *People sometimes act as if the lawyers alone had any interest in it. This is a mistake.* Obstruct the stream of justice, and the whole community suffers; corrupt its fountains, and society is poisoned. The true interest of the people, and of the lawyers, is identified."

In another article, the opinion entertained of what would be the most reasonable and natural course to pursue, is thus stated: —

"We must begin by settling the principles according to which the judiciary of such a people and government as ours should be formed, and then form it in conformity to the principles."

The conclusion of the article is in these words, which have become the basis upon which the New Code places the system of the judiciary that it establishes: —

"Upon the whole, I think we may lay down the following, as principles for the re-organisation of the judiciary: —

"1.—That the judicial and legislative departments shall be so separated that no legislator exercise any judicial function.

"2.—That besides their annual salaries, the judges receive no fee or reward whatever.

"3. That there shall be at all times judges enough, and so distributed as to do all the business as soon as it is ready, so that no suit be delayed for want of one ready to hear and decide it.

"4. *That every judge, of what class or court soever, be obliged to sit at trials by jury.*

"5. That no more than one appeal be allowed.

"6. That in all courts, except the appellate, there be but a single judge."

Such are the views on the re-organisation of the judiciary which the public mind had now become prepared to hear, and which are treated in these articles with great force and fulness. In connection with them, *Courts of Conciliation*[1] *were also proposed, and provisions for their organisation have been embodied in the present system.* But with another extract we must take leave of these articles.

"No reform in our judicial system will cure all the ills that spring from our present administration, or rather mal-administration, of the law. The other great reform, the revision and simplification of legal practice, in all its branches and in all courts, must follow hard after. How much of political and social good or ill, depends on the nature and extent of these reforms, it were vain to tell. It is difficult to imagine more unnecessary wrong than that which suitors in our courts now suffer; where justice struggles through dead forms, is harassed by delays, and baffled by multiplied appeals. Now is the time to put an end to these wrongs at once and for ever. *Now is the time for the legal profession to root out the abuses which have been made the occasion of so many attacks upon it, and to vindicate its claim to lead in the reformation of the law. Such another occasion may not occur for a quarter of a century.*"

Here again we see that the true ground was taken. The legal profession was appealed to; and it is of course by them only that any legal reforms worth having can be effected. It is not a little remarkable that this ground is now taken, as we have already shown, by the press in this country. Instead of indulging in the usual commonplace attacks on the lawyers, they are now called upon by the best advised leaders of the press to come forward and do the work.

The new constitution that went into effect eight years

[1] With respect to these Courts of Conciliation, it is specially provided that in certain enumerated cases, chiefly those sounding in tort (Pt. I. Tit. I. ch. xv., in Pt. III. Tit. VII.), any person claiming to have a cause of action against another, may compel his appearance before the Court of Conciliation, where a hearing shall be had in private, and a settlement may be made with consent of parties, of which the terms need not be specified, but which shall finally determine the matter in controversy. "We speak from experience," says the Law Reporter, "and after having resided under the Danish jurisdiction, and in the vicinity of courts of this sort, when we bear willing testimony to their efficacy, and their most salutary influences." — P. 116.

after the first article which we have noticed from Mr. Field's pen was published, contained the first great step which was taken in the movement. The 24th section of the 6th article of that instrument, is in these words: —

"The Legislature at its present session, after the adoption of this constitution, shall provide FOR THE APPOINTMENT OF THREE COMMISSIONERS, WHOSE DUTY IT SHALL BE TO REVISE, REFORM, SIMPLIFY, AND ABRIDGE THE RULES AND PRACTICE, PLEADINGS, FORMS AND PROCEEDINGS, OF THE COURTS OF RECORD OF THIS STATE, AND TO REPORT THEREON TO THE LEGISLATURE, SUBJECT TO THEIR ADOPTION AND MODIFICATION FROM TIME TO TIME."

Here we will beg our readers to observe that it was provided that the Legislature, and not the Executive, should appoint the Commissioners. This, as it turned out, was important. The Legislature was in favour of these reforms, or, at all events, of full inquiry into them. It was wise and proper, then, for them to insist on their having the appointment of the Commissioners. The Executive might not have any great love for these reforms — nay, they might wish to thwart them. We shall see that if it had not been for this provision, the right men would probably not have been named as Commissioners.

All that had been accomplished up to this moment, however, consisted merely in the removal of obstacles. An opportunity was now presented to begin the work in earnest; and it remained to be seen whether anything would, or would not, be done. It is a striking proof of how little was anticipated or expected, that Mr. Graham, subsequently one of the Commissioners to report the New Code, did, at this time, publish a new edition of his voluminous work on legal practice, which had for years been the text book of the profession throughout the State. In the preface to this edition he emphatically expresses his opinion in these words: —

"The result of the action of the Legislature upon the subject of the proposed new system, must necessarily be delayed for a considerable period; and whatever may be the character of that system, *it would not so wholly remove the ancient landmarks of the practice as to render a work based upon the existing system wholly valueless,*" &c. &c.

This was as if we were to have a new edition of Mr. Tidd's Practice brought out at the present moment in the face of the anticipated recommendations (for at present they only bear the form of *suggestions*) of the present Common Law Commissioners. But it turned out that Mr. Graham, the American Tidd, regardless of the sacrifice of this edition of his book, became a radical law-reformer; a point of much importance, because it cannot be disputed that he was the most experienced *lawyer* on the commission, and it was to him that the *profession* looked.

On the very day that the new constitution went into effect, a pamphlet, from the pen of Mr. Field, addressed to the Bar of the State, issued from the press. Its title was this: — "What shall be done with the Practice of the Courts? Shall it be wholly reformed?" It is interesting to notice that a still higher position is taken in this publication than had been assumed in any one from the pen of its author which had preceded it. It thus commenced: —

"The constitution of this State which goes into effect this day, will render great changes necessary in our system of legal procedure. It remodels our Courts; unites the administration of Law and Equity in the same tribunal; directs testimony to be taken in like manner in both classes of cases; abolishes the offices of master and examiner in chancery, hitherto important parts of our equity system; and finally directs that the next legislature shall provide *for the appointment of three commissioners, to revise, reform, simplify, and abridge, the rules and practice, pleadings, forms, and proceedings of the Courts of Record, and report thereon.*"

The author thus speaks of the opinion of the Bar with respect to the then existing state of things: —

"If it had depended upon the Bar alone, I believe that many important amendments would have been made, which we are now without. Various causes have contributed to prevent their doing as much as they would otherwise have done, the principal of which is, the jealousy with which concert of action on their part was regarded by others. It is a mistake to suppose that our present legal machinery has been regarded by them with much favour. On the contrary, I think they have disliked it generally. They would choose something better to drive over our modern ways, than this cumbrous thing — three hundred years old and more — ill adapted

to our present circumstances, unequal to our present wants, and so altered and amended, that scarce any two parts seem of a piece. Possibly I mistake the opinions and the inclinations of the majority of my profession. The part they take in the present circumstances will show what their opinions and inclinations really are.

"Every consideration, as it seems to me, makes it expedient for us all now to enter heartily upon the work of amendment. Those of us who have long been labouring for a radical reformation of the law, and those who have felt less inclination for it, should find this an occasion to act together in the common pursuit of thorough and wise reforms. We feel the inconvenience of the present state of things. We know that the technicality and the drudgery of legal proceedings are discreditable to our profession. Justice is entangled in the net of forms." (P. 6.)

As to oral testimony and the examination of parties, Mr. Field says —

"It strikes me that an oral examination is better than written answers, for two reasons; one, that it is less expensive, and the other, that the discovery will be more complete. If it be worth while to have the discovery at all, it is worth having it well done. An examination upon interrogatories never can be perfect. He must be a dull person indeed, and poorly provided with counsel, who, when he has written questions to answer, in his own closet, and ample time for it, cannot contrive to conceal as much as he discloses.

"Indeed I am unable to perceive a single reason, why one party should not have the right to call the other into court, and to question him in its presence. This is now allowed in cases of usury. Is there danger that the rights of the party will not be protected? Certainly, if with the Court before him, and his counsel by his side, his rights are not safe, then, for the same reason, no witness ought ever to be interrogated orally, for fear his rights may be infringed. Some persons are very tender of the consciences of parties, thinking that the temptation to perjury will prove too strong for human frailty, and that, therefore, if I understand the drift of their argument, no person ought to be questioned about any matter where he has an interest. This is not only striking at the foundations of all testimony, but it involves this palpable absurdity, that because, in some cases, the motive of interest is stronger than the principle of honesty, therefore those truths which are only known to interested parties shall for ever be hidden." (P. 10.)

As to one form of pleading for all cases of legal cognizance —

"What I propose, then, in respect to cases of legal cognizance, is this, that the present forms of action be abolished, and in their stead a complaint and answer required, each setting forth the real claim and defence of the parties. Such pleadings would be precisely similar to those proposed for equity cases, *and we should thus have a uniform course of pleading for all cases legal and equitable.* The distinction between the two classes of cases is now merely a distinction in the forms of proceeding. The Court of Chancery has existed only in consequence of the narrow and fixed forms of the common law. If those forms had been abolished, and a natural procedure adopted, the course of the two Courts would long ago have been assimilated.

"Let the plaintiff set forth his cause of action in his complaint briefly, in ordinary language, and without repetition; and let the defendant make his answer in the same way. Let each party verify his allegation by making oath that he believes it to be true. The complaint will then acquaint the defendant with the real charge, while the answer will inform the plaintiff of the real defence. The disputed facts will be sifted from the undisputed, and the parties will go to trial knowing what they have to answer. The plaintiff will state his case as he believes it, and as he expects to prove it. The defendant on his part will set forth what he believes, and expects to establish, and he need set forth no more. He will not be likely to aver what he does not believe. His answer will disclose the whole of his defence, because he will not be allowed to prove any thing which the answer does not contain. He will not be perplexed with questions of double pleading, nor shackled by ancient technical rules.

"When the answer is put in, the cause may either be considered at issue, without a replication, or a special replication may be allowed, to avoid new facts set up by the answer. The common replication is a mere form. Replications are not used in Louisiana, where the pleadings consist of petition and answer.

"Special replications have been long disused in the Court of Chancery, and I see no reason why they should be considered necessary in common law cases. But suppose the answer to set up new facts, which the plaintiff cannot deny, but which he can answer by new matter, explaining away the effect of the new facts of the answer, how, it may be asked, is the plaintiff to bring the new matter out? I answer, he may bring it out in his proof, in

answer to the proof on the defendant's part, just as a plaintiff would bring it out now, if the defendant should plead *non est factum* in covenant, and give notice of special matter. How will the question appear upon the pleadings? So far as the record is concerned, it will appear thus: the allegations of the complaint are admitted; a new fact is alleged on the part of the defendant; this new fact the plaintiff is considered as opposing, either by a positive denial, or as capable of being explained away by other facts, and therefore not having the effect claimed for it.

"Either this may be done, or the course now pursued in equity cases may be followed, of amending the complaint when new facts are brought forward by the answer, so as to present the facts which shall avoid the facts of the answer. Or still another mode may be adopted, that of requiring the parties respectively to give notice to each other of their points, before the trial. Something of the sort now prevails in the Court of Admiralty of this district, and in the Common Law Courts of Massachusetts." (Pp. 18, 19.)

He thus deals with the conflicting rules as to parties in Courts of Law and Equity, and the peculiar remedies of the latter Court: —

"It may, perhaps, be objected, that the rules respecting the parties in Equity and at Law, are different. This is true. They are different. But they need not be different. In all cases and in all courts, a suit should be instituted in the name of the real party in interest. The present rule respecting parties at Law, where it differs from that in Equity, is artificial, unreasonable, and ought to be changed.

"The Common Law prohibits the assignment of a thing in action. Equity allows it. The Courts of Law require the suit to be brought in the name of the assignor, or his representatives, though he has long parted with all his interest in or controul over it, and then they resort to all sorts of contrivances to protect the interest of the assignee, though they will by no means allow his name to appear upon the record. Therefore if the assignee sues at Law he is turned out of court without ceremony, and if the assignor sues in Equity he is turned out of that court with as little. This is excellent law, but it is monstrous reason. The sooner the rule is abolished the better. If an assignment is good for one court, it should be good for all. Keeping up the distinction tends only to embarrass suitors and bring discredit on the law, without doing ever one particle of imaginable good. So also as to trustees

of estates and cestui que trusts. Whatever estate or interest a man has, if he have received an injury, let him claim redress in his own name, and on his own account, in the same way as other persons claim it.

"Then as to those intermediate or interlocutory remedies, which are resorted to in Equity to protect the rights of a party during the litigation, the issuing of an injunction, the appointment of a receiver, and the like; they can continue to be applied under this new scheme of pleading, in all suitable cases, just as they now are. If the case be proper for an injunction, the Court will grant it, as it is now granted, upon filing the complaint. On the coming in of the answer, it may be dissolved or continued. Then if the complaint shows a proper case for a receiver, *ad interim*, one may be appointed in the same manner as at present. So of the writ of *ne exeat*. Whenever such a writ is proper, it may be issued, as it is now issued. In short, the form of the proceeding will admit of any relief, interlocutory or final, which can now be granted." (P. 29.)

He then discusses the objections to the distinction between Law and Equity. They are —

"First, the difficulty of fixing in all cases the limits of the respective jurisdictions; and secondly, the frequent necessity of going through both courts to determine one controversy.

"Often enough, no doubt, we hear it said, that the jurisdictions are well defined, and that it must be one's own fault if he mistakes them; but any man much conversant with the Courts, knows perfectly well that there is often great doubt about it. The lawyers must be few who have not sometimes felt embarrassed in deciding upon the forum. I have been struck with the frequency of the argument made at the bar, that the party has mistaken his remedy. There is a class of lawyers, whose favourite argument appears to be, either that the plaintiff has mistaken the forum, or that the defendant, if he has a defence, can assert it only in another court. If one were to listen much to these gentlemen, he might be tempted to think that, in their opinion, at least, nobody knew any thing about the jurisdictions but themselves.

"Recollect the New York Assessment Cases. Bills in Equity were filed to restrain the corporation of this city from selling land under assessments alleged to be illegal. The jurisdiction of the Court was maintained upon what were thought to be unanswerable reasons, by the Vice-Chancellor, the Assistant Vice-Chancellor, and the Chancellor. A great many bills were filed, until the

Court of Errors at last discovered, or thought it discovered, that there was no jurisdiction in Equity. Of course the bills fell to the ground, and the parties who had filed them, not suspecting that the Bar, the Vice-Chancellor, the Assistant Vice-Chancellor, and the Chancellor, were all mistaken on the question of jurisdiction, found themselves suddenly dismissed from the Court, with costs and expenses charged upon them, enough in the aggregate to support the whole judicial establishment of the state for years. Is not any system wrong which leads to this?

"The other objection to the two jurisdictions, — that is, the frequent necessity of calling on both to determine one controversy, — is still stronger. Is it not a shame, to keep our machinery of justice so imperfect, that one Court is incapable of deciding the whole of a cause? Every bill that is filed in aid or defence of a suit at law, is a reproach to our legal system. So is every creditor's bill. Notwithstanding the rule of Courts of Equity, that when they nave acquired jurisdiction for one purpose, they will retain the suit, so as to do complete justice between the parties, there are numerous instances in which a party is sent back to Law after having got all a Court of Equity could give him. And the instances are more numerous still of parties driven into a Court of Equity to obtain full relief, after having exhausted all the powers of a Court of Law. Not unfrequently, indeed, it happens that there are different parts of the same claim, one of which appropriately belongs to a legal tribunal, and the other to an equitable one. Cases of this sort must have occurred to most lawyers. Here is one, for example, which has just occurred. An assignment was made by a debtor, engaged in printing for a corporation, of all sums of money that might become due to him for his work. So far as it embraced work already done, the assignment was held to be good at Law, and therefore that a Court of Equity had no jurisdiction to enforce it; but so far as it embraced work to be done, it was good only in Equity, and a Court of Law could give no remedy.

"All this will be done away with, by adopting a uniform course of procedure in all cases; and nothing short of that will do it. The vesting of the two jurisdictions in the same tribunal will prove no advantage if the jurisdictions themselves are kept distinct by differing modes of procedure. The union of Law and Equity in the Supreme Court was regarded with the most opposite feelings by different members of the profession: some looking at it with much favour, others with the utmost dislike. If, however, it is to be

simply a grant of the two separate jurisdictions to the same judges, not a blending of the jurisdictions in one harmonious system of procedure, the friends of reform will have gained nothing. They will rather have lost, because the same court cannot work with the two machines so dexterously as two courts, one with each. The real good which the Convention appears to me to have done was the taking a step which should lead to a blending of the jurisdictions. When it is certain that the same man must sit to administer the two kinds of relief, it will soon be seen that there is no real necessity for the different forms of administering it. As a movement towards that desirable end, the friends of reform were glad to see it; but if it were to stop there, it would be worse than nothing." (Pp. 32—34.)

In this pamphlet Mr. Field thus particularly addressed the lawyers of New York. Indeed, the whole argument is intended for those most capable of appreciating it: —

"I think that the Convention intended, and that the people expect, greater changes than these. We know that radical reform in legal proceedings has long been demanded by no inconsiderable number of the people, — that a more determined agitation of the subject has been postponed by its friends till such time as there should be a reorganisation of the judicial establishments, upon the idea that a new system of procedure and a new system of Courts ought to come in together, — that it was a prominent topic in the Convention itself, where its friends were in an undoubted majority, — and that the manifestations of public sentiment out of doors were no less clear than were the sentiments of that body. Indeed, if now, after all that has been done within the last five years, there should be made only such changes as the Constitution absolutely commands, there will be great and general disappointment. The profession stands at this time in a position in which it has not before been placed. Shall it set itself in opposition to the demand of a radical reform? shall it be indifferent to it? or shall it unite heartily in its prosecution? None can reform so well as we, as none would be benefited so much. We cannot remain motionless. We must either take part in the changes, or set ourselves in opposition to them; and then, as I think, be overwhelmed by them." (Pp. 5. 6.)

This address appears to us to apply to our own legal profession at the present time. Shall we assist in directing the

feeling in favour of law reform into the right channel, or shall we oppose it, and suffer all the consequences that may ensue? It is quite true that if the public take this matter into their own hands, their attempts at reform may be ridiculous[1], but they may thus work great and perhaps irreparable mischief. To put out of the question all sense of duty, is it wise or safe for the profession to leave this important matter to take care of itself?

The effect of this publication was great. It aroused the indifferent; it encouraged the timid; it dismayed the bigoted; and it inspired with new energies the tried and veteran friends of this great reform.

The impression made by the "Address to the Bar" was followed up by a memorial to the Legislature. This was drafted by Mr. Field, and signed by members of the Bar of the city. This memorial is one of great importance, as the Legislature, by granting its prayer, enacted that the reform should be made upon the basis of the principles for which Mr. Field had struggled so perseveringly. It is in these words: —

"The memorial of the undersigned members of the Bar in the city of New York respectfully represents, — that they look with great solicitude for the action of your honourable bodies in respect to the revision, reform, simplification, and abridgment of the rules of practice, pleadings, forms and proceedings of the Courts of Record. They are persuaded that a radical reform of legal procedure, in all its departments, is demanded by the interests of justice, and by the voice of the people; — that a uniform course of proceeding, in all cases legal and equitable, is entirely practicable, and no less expedient; — that a radical reform should aim at such uniformity, and at the abolition of all useless forms and proceedings. Your memorialists therefore pray your honourable bodies to declare, by the act appointing the Commissioners, that it shall be their duty *to provide for the abolition of the present forms of action and pleadings; for a uniform course of proceedings in all cases,*

[1] An absurd instance may be found in the recent experience of the Assembly of one of the United States. A bill was brought in "*to abolish Special Pleading*," by which was meant the long speeches of counsel. "Special Pleading" was accordingly abolished, but the counsellors went on talking just as if nothing had happened!

whether of legal or equitable cognizance; and for the abandonment of every form and proceeding not necessary to ascertain or preserve the rights of the parties."

This memorial was presented to the Legislature on the 10th of February, 1847, and on the 8th of April succeeding, the law for the appointment of the Commissioners was passed. In this law was embodied the prayer of the memorial above, in the very words of the memorialists.

Something had now been done. A step in advance had been taken. The Legislature had provided for the appointment of the Commission, and prescribed its duties in the very words of the most enthusiastic champion of this reform. The long passed years of toil, agitation, and discussion had at length begun to show signs of a distant harvest. So slow and backward are States, as individuals, to foresee and comprehend the measures which promote their welfare, that they must be urged and almost goaded to make the effort to grasp them.

The three Commissioners had been nominated previous to the presentation of this memorial, the effect of which was to require them to adopt a radical reform, and they were subsequently appointed. They were, Nicholas Hill, of Albany; David Graham, of New York; and Arphaxad Loomis, of Herkimer. Mr. Field, it will be observed, was *not* appointed a Commissioner. In this the practice of the authorities of New York resembled too closely that usually prevailing in this country, under which the person who is best known as connected with any given reform, and has been mainly instrumental in fixing public attention upon it, is put aside when the proposed reform is carried and comes into operation. This is very short-sighted policy, and in this instance Providence had determined it otherwise.

On the meeting of the Commissioners together, it appeared that Mr. Loomis entertained the same views which Mr. Field had so strenuously advocated. Mr. Graham, whatever may have been his previous sentiments, and notwithstanding his book of Practice, coincided with Mr. Loomis; and Mr. Hill, still dissenting, at last resigned. At the extra session of the Legislature in September following, *Mr. Field was appointed*

as one of the Commissioners in Mr. Hill's place. Up to this moment nothing whatever had been done by the Commissioners, except to report to the Legislature that they had agreed upon the reform which the law of their appointment required; the very reform, in fact, which Mr. Field had proposed. The Commission was now united in opinion, and by the addition of Mr. Field possessed ample spirit and enthusiasm for the most thorough and effectual labour. Accordingly, on the 29th of February, 1848, little more than five months afterwards, we find the Commissioners reporting portions of the first and second parts of the Code to the Legislature. Of the contents of the Code, we have already given a full account[1], and to this we beg to refer our readers.

At the close of their sixth report, on the 31st of December, 1849, the Commissioners[2] resigned the high trust that had been committed to them; for their work was done.

The best proof of the success of this remarkable experiment, is its adoption in the other States of America: —

"Any movement in New York," says the Law Reporter, a fair exponent of American feeling on this matter, "on the subject of Jurisprudence is naturally watched with great anxiety, and the triumph or failure of the experiment in that State is thought to be conclusive as to the success of the experiment elsewhere. If any one doubts as to this point, let him note how the jurisprudential policy of New York is now controuling that of Massachusetts, Missouri, Mississippi, Winconsin, and California, and probably also that of Ohio. Such a movement in most other States would have attracted little general notice; but in New York, with a consciousness of great power, there seems also to have existed a great sense of responsibility, and from the outset every project of reform has been most stoutly resisted by all who wished things to remain as they were. But it now seems to be almost conclusively settled, that the fundamental change which has been suggested in

[1] 12 L. R. 366—398. and *antè*, pp. *65*—87.

[2] We have seen it stated by some writers in this country that the Commissioners came so speedily to a conclusion because they were unpaid. This is not according to the fact. The Commissioners received a salary inadequate to their merits, it is true, but *they were paid;* and we have a great mistrust of the value of all unpaid services.

New York is to result in a new system of practice in that State, and probably throughout the Union." (P. 113.)

So far there seems to be no doubt; but we must now bring *our* readers to a more important point. How far may we profit in this country by the example of our American cousins? What effect is this great change to have on the jurisprudential policy of this country? How long, in England and Ireland, is the distinction between the procedure in Law and Equity to be preserved? Scotland has not this question to answer, for there no such distinction exists; and, at all events, we think the people of this country will demand a satisfactory reason why the sister kingdoms should not be, in this respect, placed on an equal footing.

In the meantime the learned body which has brought this change before the country has taken, as it appears to us, a wise and proper course. An inquiry has been set on foot by the Law Amendment Society through the best channel, which will, we think, produce a useful body of evidence on the subject, to be available for the use of Parliament when it assembles. Application was made to Mr. Lawrence, the American ambassador, to transmit questions to persons resident in New York and elsewhere in the United States of America, most competent to give information on the working of the Code; and that gentleman at once most kindly undertook this duty. We give below[1] the form in which this

[1] *Society for Promoting the Amendment of the Law.*

"At a meeting of this Society, held on Monday, December 9. 1850, Mr. M. D. Hill, Q. C., in the chair, it was resolved, — That having reference to the proceedings of this Society on the 18th of November last, when Mr. David Dudley Field explained the operation of the New York Code (by which the distinction of procedure in Courts of Law and Equity has been abolished), questions relating to the working of this Code should be circulated among lawyers, merchants, and others residing in New York and other parts of the United States.

QUESTIONS.

1. Are you acquainted with the operation of the New York Code of Civil Procedure which has recently come into operation?

2. Are you particularly acquainted with any suit or suits conducted by means of its provisions?

3. Have you been personally interested in any such suit?

4. Have you been professionally engaged in conducting any such suit?

communication has been made to the questions which have been put; and we shall hope, on some future occasion, to lay

5. What has been the effect of this Code in promoting or repressing unnecessary litigation?

6. Are you acquainted with the conduct of any suit since the Code came into operation, which involved both points of Law and Equity, and which, heretofore, would have necessarily taken the parties both into a Court of Law and a Court of Equity? And if so, has the change made by this Code been on the whole beneficial?

7. Has the new system of pleading led to inconvenience in bringing parties to trial before they had a full knowledge of the issues to be raised? If so, has such inconvenience been obviated by the powers given to the Judge of adjournment, &c.?

8. Has the abolition of the rules regarding the incompetency of witnesses tended, in your opinion, to elicit the truth?

9. Does the experience you have had of the admission of the evidence of interested witnesses lead you to desire that the principle should be carried to its full extent by making parties competent to give evidence in their own behalf?

10. Do the regulations as to execution in suits under appeal tend to diminish the number of appeals brought for delay or for the indulgence of a spirit of litigation?

11. Is it found easy in practice to bring the merits of a case into review on appeal?

12. What is the working of the New Code as to the diminution of time and cost in litigation?

13. Do any and what obstacles yet remain to be removed before a suit can with certainty be decided on its merits and on no other ground?

14. Since the adoption of the Code, has any suit, to your knowledge, gone off on points not decisive of the merits?

15. Has the Code been adopted in any other state or country?

16. Are there, in your opinion, any circumstances arising out of the social position or political institutions of the State of New York which are likely to make such a Code work better or worse in another country?

17. Has the new course of procedure reduced the remuneration of professional men, in respect of a suit, in greater proportion than it has diminished their labour?

18. Are the members of the legal profession as a body favourable to the change?

19. Having regard to the difficulties inseparable from a new Code of Procedure, would you now return to the old state of things?

[It is not necessary that the answers to these questions should enter into detail, the object being to collect opinions on the working of the Code in as concise a form as possible.]

By order of the Council,

BROUGHAM, *President.*

WILLIAM VIZARD } *Hon. Secretaries.*
ARTHUR SYMONDS }

London, Dec. 10. 1850.

before our readers some of the answers that are made to them; and we can already refer them to some evidence on the subject of no ordinary value[1]; at all events, a course has been taken worthy of a scientific and philosophical association; and we attach the highest importance to the inquiry thus set on foot. We adduce it as another proof of the good which the Society has effected, and will effect, with the small means at its disposal. It proceeds thus cautiously, but boldly; and these, it appears to us, are the characteristics of its seven years' ministration in the great field of Law Amendment.

It would, perhaps, be premature, on the present occasion, to express any settled conviction in this matter. We await the result with hope and confidence. If we are to take the sentiments already expressed by the great organs of public opinion in the press, of all parties, and all shades of politics, the country has already significantly declared that England and Ireland are ripe for this great change in procedure at present. We hold it to be our duty rather to restrain public feeling in this matter than to urge it forward. This is not an alteration which should be lightly made; and although we should not shrink from giving it the most ample investigation, or hesitate to adopt it, if the proper case be made out, yet we do not think it right to assist in swelling a popular cry which might precipitate matters. The feeling of responsibility must arise in those who have been chiefly instrumental in bringing this subject forward; and we are quite sure that, as far as they are concerned, the inquiry will be calmly and properly conducted.

Let us then consider, in the meantime, what are the circumstances which are common both to New York and England in this important matter. It is, at all events, safe to place before our readers those circumstances which appear to us to establish a close parallel between the State of New York and this country in this matter.

1. The same law prevailed in both countries. Previous to the Code, not only were the principles the same, but the same practice obtained, in New York. The Judges and officers of

[1] See *post*, note A.

the Court, Chancellor, Vice-Chancellors, Masters, and Examiners, were to be found in both countries. The same machinery existed before the adoption of the Code on both sides of the Atlantic.

2. If the system has been the same in both countries, so certainly have been the complaints that suits are not decided on the merits, but on mere legal technicalities — in other words, that the law, as administered, may benefit the lawyer, but that the suitor cannot obtain justice. We have seen how long they have been made in New York. They certainly were never in any period of the history of our own country so loud, so universal, or so well directed as at present.

3. We find also that as the profession of the law was divided in opinion in this matter in New York, so is it here. The party which, in this country, has declared itself for reform is, it appears to us, the most distinguished for its ability and energy; but there is doubtless a large portion of the profession which, for the reasons that have been already pointed out by Mr. Field, is adverse.

4. While we write, another point of similarity is to be noticed. A new Chancery Commission has been appointed — a new inquiry is to be made into the practice and pleading of the Court of Chancery. But here we fall far short of the reformers of New York. The new Commissioners have no instructions to codify, and thus reform, the procedure; but are only *to inquire.* Perhaps we have had too much inquiry. What we now rather want is *action.*

The course taken in New York is, at all events, worth consideration. There *the Assembly* appointed (not the Executive) THREE Commissioners (not seven) to form a *code* (not to inquire). Parliament may probably take this matter into its own hands, just as the New York Assembly did. If the Commissioners named were Parliamentary Commissioners, appointed by the House of Commons, full power might be given to them to *act,* not to *inquire;* and then a very limited number should be appointed. Three or five are, in fact, quite sufficient; and they might have legislative powers conferred on them (subject to parliamentary confirmation); for surely it is impossible that *Parliament* could legislate on such

a matter effectually. The New York Code was reported complete by the Judiciary Committee of the Assembly after *a revision of half an hour!*

This may turn out to be the duty of Parliament. There is also a duty imposed at the present time on all well wishers to the amendment of the law who are not in Parliament; and here, also, we may take a hint from the Law Reformers of New York. *Let us petition Parliament* extensively for the Amendment of the Law. The profession should present a memorial of this nature; but so, also, should all unprofessional persons who find themselves aggrieved. This is a constitutional and proper course; and it is likely now to be a useful, if not a successful one. We hope this step may lead to the formation of a Law Reform party in Parliament, who will act together on this question, independently of mere party considerations.

We have thus endeavoured to present to our readers the real state of this question, and we think we have not exaggerated its importance. In its whole breadth it deserves, and must receive, the fullest consideration. Nor are we entirely without materials for discussing it in its direct bearing on English procedure. We feel some pride and pleasure in thinking that this subject has for many years engaged the attention of, at all events, one gentleman of the English Bar, who, in 1848, gave his brethren the benefit of the conclusions to which he had arrived. The work of Mr. Trower was noticed by us at the time[1] it was first published, and it well deserves a reperusal at the present time, as now

[1] 8 L. R. 62. In the preface to the present edition, Mr. Trower says, "What cause, indeed, is there not for hope to sincere Law Reformers! What works of amelioration has not the year now closing on us accomplished! It has seen the principles of jurisprudence, held in un uestioning veneration for centuries, abolished by a stroke of a Lord Chancellor's pen; it has seen the framework of Chancery suits compressed within dimensions no larger than those of a common bill stamp; it has seen the Gordian knot of Common Law entanglements unravelled by the almost instantaneous adjudication of the extended County Courts; it has seen an Act of Parliament passed with acclamation which an Hardwick and an Eldon would have shuddered to think possible; it has seen candidates on the hustings pledging themselves as to a cardinal doctrine of their political creed, vigorously to carry out Law Reform; it has seen the public press teeming day by day with leading articles on the same subject."

reissued. We shall prefer, on the present occasion, making one or two extracts from Chap. IV., which gives some illustrations of the anomalies of the severance of Law and Equity in this country; and first the author alludes to the practice as to Injunctions:—

"The Injunctions to which I wish here especially to refer, are those in which the extraordinary interposition of Equity is resorted to, in order to repress the UNJUST exercise which a party would otherwise be enabled to make of his LEGAL advantages! Strange words these! but true: and if true, conclusive, one would think, (without more) that Law and Justice are contrary the one to the other. Thus the Courts of Common Law have never scrupled to *legalize unjust defences!* As, for example[1], if A., the devisee of land, brings an action to recover it against C., (the heir of the devisor,) who is unjustly in possession, C. may successfully defeat the action by showing a leasehold interest in the land vested in D., notwithstanding that it may have been so vested in him expressly as a trustee for the rightful owner, and to protect his title! In other words, because A. has no *present* '*Legal estate*,' that being in D., the Courts of Common Law will close their doors against him, for C. will immediately plead D.'s 'outstanding term,' (as it is called,) and it will be apparent that he ought not to be disturbed in his possession by a tribunal which avows cognizance only of a Legal Title; and that, it has been shown, is at all events not in A. How then is A. to effect his object? Why, he must institute an entirely new suit[2] in Equity; and procure an Injunction to restrain C. from making use of the defence he would otherwise be entitled to set up; to effect, in fact, a removal of D.'s leasehold interest, and to treat the question as if there were no such impediment in the way of a fair hearing. Fortified with the Injunction, A. now returns to Law: C. is inhibited from sheltering himself under the plea of D.'s Legal tenancy, and the land is awarded to A.

"Now mark the amazing absurdity of this state of things. A. (and the cases we have put have been of frequent occurrence) could not *proffer his claim originally in Equity*. His remedy, his only acknowledged remedy, was *at Law*. He was compelled to resort there, *because that was the only tribunal appointed to try the facts in dispute* between the parties. And yet it withheld the very

[1] Lord Red. 134. 2 (Mr. Justice) Story's Equity Jurisprudence, 169.
[2] 1 Simon and Stuart's Reports, 419, 420.

means indispensable for a fair investigation of the subject. Nay, if not controlled by Equity, it would have decided in the very teeth of the facts, and decreed the land to C.! The suitor, baffled and buffeted from court to court, is at first denied a full hearing in that one in which he is obliged to commence his suit, and, finally, by the help of an extrinsic tribunal, forces the original court to hear the case, *contrary to its own rules, and to retract its previous denial!*

"I have instanced the above class of cases, notwithstanding the alteration which the Legislature has recently effected[1] with reference to them; partly, because this alteration being, as it affects the point we are considering, in its remedial effects prospective only, has left untouched cases existing at the date of the act, and therefore will not operate fully on titles for many years to come; and partly, because the foregoing instances will ever stand out as witnesses, even when the act shall have come into full operation, of the anomalous mode in which the Courts of Common Law have been suffered, up to so very recent a period, unjustly to work out their principles, and must tend to diminish both our confidence in them as the bulwarks of our liberties, and our reluctance to protest against their claim to inviolability. Moreover, the very enactment of such a statute, opposed as it is to the time-hallowed spirit of the Common Law, and destructive of one of its peculiar and favourite dogmas, shows more clearly than words can express the arrival of a great Jurisprudential crisis, demanding, like that Spiritual Revolution which of old expelled the Pagan idols from the altars they had polluted, the substitution in the sanctuary of Justice of a nobler and purer discipline!" (Pp. 38—41.)

We shall give a more *practical* illustration:—

"Again, suppose a party proceeds at law to recover an annuity, or any other benefit, which has been granted to him by an instrument properly executed in all outward respects, but which was in truth procured 'without consideration,' (as it is termed) that is, without a sufficient reason moving the grantors to make the grant;

[1] "8 & 9 Vict. c. 112., "An Act to render the Assignment of Satisfied Terms unnecessary." The prospective character of the act will be defended, I presume, on the ground of the protection due to existing rights. If the advantages gained by the assignment of terms were *rights*, in the true sense of the word, I grant that the act could not have been retrospective without violating a first principle of natural justice: but they were *obstructions to rights, as in fact the act admits.*"

or suppose the instrument to have been framed contrary to the intention of the parties to it, by fraud, mistake, or accident; will the defendant be allowed, in a court of Law, to avail himself of any one of these circumstances, which go to make up the very essence of his case? No.[1] To Equity he must resort: there, but there only, he may reveal the fact that he never received a shilling for the annuity, or that the instrument was drawn up in direct contravention of the agreement; but *Law* will never admit these explanations, however true and necessary for a righteous judgment, in opposition to so strong a counteracting circumstance as a formally executed parchment!

"But is this a tribunal fit to arbitrate on the real property of a country? Is this meting out justice to a people? Is this a policy commensurate with the wants of an enlightened nation? It is no reply to say, 'There is Equity open to you; your wants may be *there* supplied. Flee thither, and no *eventual* injustice ensues.' I answer, that what Englishmen have a right to require, is not an indirect, but a direct dispensation of justice; not a tardily eked out, but a spontaneously accorded measure of right; not a twofold, but (if there must be any) a single-handed and decisive litigation. I answer, that the birthrights of the people should be administered in as liberal, as uniform, as costless, as intelligible, and as speedy a manner as possible, and that no narrow rules, no diversities of practice, no hair-breadth subtilties, no nice balancings of jurisdiction, should interpose between them and the simple avenging of their wrongs. The unfortunate suitors whose case we have been just considering, had a right to expect, that if they had any legitimate ground of defence, they should be allowed to adduce it before and to have it duly weighed by, that self-same tribunal, on that self-same arena, which their adversaries had summoned them to, and selected for the contest!" (Pp. 44, 45.)

We must now give a brief notice of those cases in which a court of Equity sends her suitors to a court of Law: —

"The reader must here be informed, that there is an immense mass of cases, daily coming before the Equity Courts, in which the real merits of the contending parties are never touched; those

[1] Lord Red. 128, 129. 1 Story's Eq. Jur. 349. 2 Bl. Comm. 446. Morrison *v.* Wilkins, before V. C. Wigram, Dec. 1847, which was the case of a policy alleged to have been assigned with a fraudulent intent, where the V. C., under the circumstances, allowed the plaintiff at law to proceed with his action.

cases, I mean, which have not yet reached the stage in which the rights of the litigants come to be discussed; cases,—in which the whole argument turns upon preliminary points, matters of pleading, questions as to whether this or that court has jurisdiction in the suit, and so forth; cases,—off which, it may be said, the rind and bark have not yet been stripped; and which are, at an enormous cost, at intervals of weeks or months, dragging their slow lengths along, without involving anything more at each successive hearing, than the discussion of dry details of practice. Now it is not here for an instant pretended, that cases can proceed in any court, without a certain observance of prescribed technicalities;—every system has, and ever will have, its formularies; and no code of laws can be conceived, which shall not be incrusted with a ceremonial fence-work; but what is insisted on is this, *that anything which procrastinates and complicates an arrival at the merits is vicious;* and that any abridgment, which can with safety be made, of the purely formal part of Law, as contrasted with its substance and vitality, ought to be made; and that the separate administration of Law and Equity multiplies beyond all telling that procrastination and complexity, and is its chiefest cause. So do not think, gentle reader, when you take up the newspaper in your breakfast parlour, and your eye rests, as you throw yourself into an easy arm-chair to peruse its columns, on the report of (perhaps) a long expected and anxious cause, that it contains an adjudication, or even an approach to an adjudication of it. It is merely one of the hundred occasions, in which, before you hear the last of it, counsel and solicitors will be tearing it to pieces, and helping themselves to the lion's share of your victimised property. It is merely the resolution, probably not even that, but an adjourned debate, of a by-question, infinitely remote from the real pinch of the case, the true and only point at issue. It is merely one of those strong spokes of delay, which the severance of Law and Equity has thrust in the way of a speedy and straightforward decision." (Pp. 49—51.)

We have now extracted enough, we think, to induce the reader to make himself master of the whole of this argument: and he will find, in this most able and careful work, an armoury, whence he may select weapons at choice to combat a system so absurd and mischievous as is now administered in our Courts of Law and Equity.

It is proper, also, to state that the subject of a union in

one court of all the remedies here administered in Courts of Law and Equity, has received the consideration of some of our own judges on the East Indian Bench. Sir Erskine Perry, whose labours in this cause we have felt it our duty repeatedly to bring before our readers, has very recently published a pamphlet in this country, in which he boldly lays before us his plan of procedure. To this we shall refer in another part of this Number, where it will find a more appropriate place; but we shall here make an extract from a paper presented by Sir E. Perry to the Government of India, by which it will be seen that this subject has engaged the attention of the procedurists of India. He says, —

"The Common Law is hampered with all the starched and stiff formulas, which, as I have shown, belong to the jurisprudence of early nations. Equity is happily emancipated from all such distressing impediments to the attainment of justice, and as the growth of a later age, of a deeper philosophy, and of a more refined system of ethics, it is well entitled to perform the office, which it constantly exercises, of pronouncing the imperative rule of law in constradiction to the narrow dictates of the Courts of Record at Westminster Hall. There is a minor objection to be made, and it is worth making, because it appears to me to show that my learned friend (Sir L. Peel) has not steadily kept in view the principle of introducing uniformity of procedure, with which he set out. He has in my opinion very wisely selected the best portions of the different systems for eliciting the truth which are now in operation in the Supreme Courts. With this view he has adopted the principle of *vivâ voce* examination on the Equity side, and he has also introduced into the Common Law that grand instrument for eliciting the truth which distinguishes Equity, and almost compensates for its other defective procedure, viz. discovery by the parties on oath.[1]

[1] Lord Langdale's recent description of the powerful effect of Discovery is worth copying in this place.

In Equity, "Every defendant is bound to discover all the facts within his knowledge, and to produce all documents in his possession which are material to the case of the plaintiff. However disagreeable it may be to make the disclosure, however contrary to his personal interests, however fatal to the claim upon which he may have insisted, he is required and compelled under the most solemn sanction to set forth all he knows, believes, or thinks, in relation to the matters in question. The plaintiff being subject to the like obligation on the requisition of the defendant in a cross bill, the greatest security which the nature of the case supposed to admit of, is afforded for the discovery of all

But in introducing this novelty into the Common Law, he has not adopted the analogy of Equity, but has in fact made the discovery to be given on the two sides of the Court completely different proceedings. By Sir L. Peel's scheme, a party at Law may be examined by his opponent *vivâ voce* at any stage of the suit; by his new scheme in Equity he may also be examined *vivâ voce*, but only at a later stage of the cause, after his answer has been reported insufficient, and after the time for filing exceptions has expired. How great the difference is between these two new modes of applying discovery, let lawyers decide.

"But greater and more substantial differences exist between Sir Lawrence Peel and myself than any I have yet adverted to. Supposing that we both agreed (as I conceive we do) that the Supreme Court sitting on its Equity side, with the improvements in examination adopted from the Common Law, and of discovery according to the new mode proposed by Sir L. Peel with Sir H. Seton's valuable work on decrees and Chitty's Forms available for the Judges — admitting that the Court with these aids could administer the whole corpus of the English Law, the question is still behind as to the mode in which the matters in dispute should be brought before the Court. With the opportunity of examining the parties *vivâ voce* at an early stage of the suit, and by adopting that lucid arrangement which only exists in the Ecclesiastical Courts, of having all the allegations of the parties broken up into distinct articles or paragraphs, it may be plausibly argued that the principal evils and redundancies now complained of in Equity pleadings would disappear. In a word, the Gibraltar system, which I adverted to in my first Minute — of bringing every thing forward on petition and answer,—would be in force." (Pp. 55—57.)

This subject has also engaged the attention of the Indian Law Commissioners, who have discussed it with reference to the vigorous attempt made by Lord Mansfield — the greatest of modern judges — to introduce equitable principles into a court of law. The Indian Commissioners support Lord Mansfield in opposition to Lord Kenyon and Lord Eldon; and we certainly think the former noble lord has the best of

relevant truth, and by means of such discovery this Court, notwithstanding its imperfect mode of examining witnesses, has at all times proved to be of transcendent utility in the administration of justice."— *Per Lord Langdale*, M. R. Flight *v.* Robertson, 8 Beav. 34.

the argument. This phase of the question we have already brought before our readers.[1]

It is also worthy of observation that, in one of the early speeches of Lord Lyndhurst on Chancery Reform, he noticed the fact that, in some of the States of America, this division of jurisdiction obtained. "In a country," he said, "where it was easy to change, where reform was popular, law and equity had been kept distinct." This reason against a *fusion* exists no longer; at all events not in New York: nor will it long exist, we venture to say, in any other American State. We need hardly remind our readers, that in no other civilised country of modern times (except England) has it ever existed: and even in England the Court of Bankruptcy (certainly one of the most popular and effective tribunals of the country) is expressly declared, by act of parliament, to be a court of Law and Equity; and, under the Joint Stock Companies' winding-up Act, a master in Chancery has all the powers of a judge in Equity, and of a Nisi Prius judge: and this, according to the statement of Master Farrer, works well in practice.[2]

We have thus enabled our readers, to some extent, to judge for themselves in this matter. We have not brought it forward without much deliberation: and we commit the whole subject to the watchful care of the Legislature.

ART. II.—NAVAL ENLISTMENT AND IMPRESSMENT.

[Continued from p. 64.]

We concluded our last article on this subject by referring to the stat. 50 Geo. 3. c. 108., by which it is provided that the protection therein mentioned shall operate "in case of an ac-

[1] 10 L. R. 284—308. Art. "The Separate Jurisdictions of Law and Equity."

[2] See Bank. Com. House of Lords, 1849, and 10 L. R. 308.

tual invasion of these kingdoms, or imminent danger thereof." Without wishing to turn alarmists, we may observe that, in the opinion of many sober-minded military men (not taking into account the speculations of enthusiasts), an "actual invasion" of England is by no means so improbable an event as is supposed by many of us who "live at home at ease."

By the stat. 5 & 6 Wm. 4. c. 24., seamen who have served the term of five years, whilst any proclamation calling for the service of seafaring men shall have been in force, are entitled, on being discharged from the navy, to have from their commanding officer a certificate of service, upon proof of which they are further entitled to a protection from service in the navy for the space of two years; and this protection is to be issued *gratis* by the Admiralty. If any such seaman, however, is discharged, except upon his own application, before the term of his service amounts to five years, a protection is to be granted to him for one year only.

Seamen who have provided substitutes under the 9th section of the same act (*suprà*, p. 45.), are entitled to the same protection as if they had personally served for the term of five years.

Since the Revolution various other acts of parliament have created exemptions in favour of seamen. But either by the cessation of the wars to which some of these acts manifestly bore reference, or by the repeal of others, or by the expiration of the time limited for the duration of the rest, the exemptions in question are no longer in force.

It was decided by the Court of King's Bench, in the case of William Gallile, a seaman pressed to serve on board H. M. S. Zealand, in 1798, that the act 6 & 7 Wm. 3. c. 18. s. 19., whereby the master of a collier is allowed to nominate two seamen of his crew to be free from impressment, is no longer in force.[1] A contrary opinion had been entertained and acted upon by the same Court in the case of Drydon, who, while serving in a collier, had been impressed and carried on board H. M. S. Rose, Captain Riou; and also in the

[1] Gallile's case, 7 Term Reports, 673.

case of one Atkinson, a seaman on board H.M.S. Terpsichore, who had been impressed under similar circumstances.[1]

The stat. 2 & 3 Anne, c. 6. was limited to the war then existing.[2]

In 1801 it became a question whether a Newcastle keelman, entering himself as an apprentice to the sea-service, was to be deemed a person who had "not before used the sea," within the meaning of the act 13 Geo. 2. c. 17. s. 2.[3], so as to entitle him, by virtue of his apprenticeship, to exemption from impressment for three years. This point arose upon a motion to the Court of King's Bench for a habeas corpus directed to the commander of H.M.S. Edwinstowe, to bring up the body of one Robert Softly[4], who had been impressed while serving on board his master's vessel in the Tyne on the 9th January, 1801. He was apprenticed to the sea service in May, 1800, for three years; and in the same month he obtained an Admiralty protection as an apprentice. He produced evidence that he had never served at sea, nor been previously bound to the sea-service; that a keelman's employment on the Tyne consists in receiving coals into vessels called keels, at the wharfs on the banks of the river, and navigating the keels to Shields or other parts of the river, and there putting the coals on board sea-going ships; that such employment does not render it necessary to go to sea; and that the men so employed do not go beyond the river. It was, under these circumstances, contended on his behalf, that the *sea*, in the language of the act of parliament, must mean the open sea, in which he had never served, or been bound to serve, before his apprenticeship of May, 1800, which had not expired when he was impressed; and that he was therefore entitled to his discharge. On the part of the Crown, however, it was shown that Softly had been employed in navigating keels upon the Tyne since he was ten years of age, and had for the last five years been in the same sort of employment as a man; that in December, 1799, he had been bound apprentice to a coal-fitter, at Newcastle, for

[1] Drydon's case, 5 Term Reports, 417.
[2] Ibid. 419.
[3] *Suprà*, p. 61.
[4] Softly's case, 1 East's Reports, 466.

a year, but had deserted in May, 1800, when he went to Sunderland, and entered upon his present apprenticeship; that the Tyne keels are of about twenty-one tons burthen, and usually navigated by four persons,—the skipper, two men, and a boy; that the keels are fitted with one, and sometimes two, masts and large lug sails, and sometimes with studding sails and two oars, and steered with a rudder and tiller; that the sea at and near Shields frequently runs high, and that great skill in steering and managing a vessel is required to navigate the keels, particularly in tempestuous weather, when they are often driven to the mouth of the river, and sometimes to sea; that the generality of keelmen are very expert in trimming their sails and handling their oars and rudder, and steer with great facility and precision in narrow and intricate channels, and particularly in getting alongside of vessels when the wind blows high; that they occasionally assist ships in the river, and help to rig and work them; and that the branch pilots of the Tyne were selected from the keelmen. Several persons conversant with the impress service also swore that keelmen were often impressed. Under these circumstances the Court of King's Bench unanimously held Softly to be liable to impressment as a person ordinarily employed upon a navigable river. "Besides," continued Lord Kenyon, "if it were necessary, I am not sure that the mouth of such a river as the Tyne is not, in a general sense, to be called the sea. Navigable rivers below the bridges, where the sea ebbs and flows, are called *æstuaria maris*. The rivers Severn, Mersey, and Dee have outlets of the same description. The lower part of the Severn, which takes the name of the Bristol Channel, is no doubt the sea; and the outlets of the Mersey and Dee, which are called the estuaries of those rivers, are so likewise. It is clear, however, that the persons employed in this sort of navigation are not those inexperienced landsmen whom the Legislature, in order to encourage them to enter upon this mode of life, meant to protect for a time; for the keelmen are for the most part able and expert navigators: and an officer well acquainted with those parts, who joins in the affidavits, says he should prefer as a seaman a person of the

age of twenty-one, bred to the keels, to one who had been two voyages to the East Indies. This person, it appears, is of that age; and it is most obvious that he has bound himself apprentice, not for the purpose of learning his business, but in order to protect himself from being impressed. And I think we should be dealing away the security of the country, if we were to hold that the protection of the act extended to persons of this description binding themselves apprentices."

It has been decided that apprentices in the Greenland Fishery are not exempted from impressment, by the enactments which protect *mariners* so employed. The right of such apprentices to protection stands upon the general law, as contained in the stat. 13 Geo. 2. c. 17., relative to apprentices in general; so that if any person in the Greenland fishery take apprentices for more than three years, they do so at their own risk, as neither the master nor the apprentice can obtain any advantage by it in the way of privilege against impressment.[1]

The question what was meant by the "fisheries of this Kingdom" in the[2] act 50 Geo. 3. received a judicial determination in the year 1813, when writs of habeas corpus issued to the commander of H. M. S. Musquito, to bring up two seamen, named Samuel Payne, and John Thoroughgood, to be discharged as having been illegally impressed.[3] These men had gone to sea in 1812 in the Adventure fishing smack of fifty-nine tons, a vessel belonging to a company formed for carrying on the lobster fishery at Heligoland. The vessel had cleared out at Harwich for Heligoland, and had a license to be employed in fishing for lobsters there. On the 1st of June, 1812, she was in the North sea, about forty miles to the westward of Heligoland, and bound to the island for the purposes of the fishery, when she was boarded by an officer of the Musquito, who impressed Payne and Thoroughgood. Payne was a mariner of the age of twenty-nine years, and regularly bred to the fishing business: and Thoroughgood, who was nineteen years of age, was apprenticed to the owner of the

[1] Brocke's case, 6 East's Reports, 238.

[2] *Suprà*, p. 63.

[3] Payne's case, 1 Maule and Selwyn's Reports, 223.

Adventure for seven years to learn the art of a fisherman. Both, at the time of the impressment, were employed in the fishery, and were in possession of regular Admiralty protections. Heligoland had surrendered to Great Britain on 1st Sept., 1807. Payne and Thoroughgood therefore claimed exemption under the stat. 50 Geo. 3. c. 108. s. 2. It was argued that lobsters are caught only in shoals among rocks, and that therefore the fishery in question was not a fishing in *deep seas*. But the Court held that to be immaterial; and discharged the men on the ground that the Heligoland lobster fishery was one of the "fisheries of these kingdoms." Lord Ellenborough, C. J.: "The question is reduced to this, viz.: What is meant by the 'fisheries of these kingdoms?' These kingdoms have coasts, and what may be termed a land jurisdiction, extending between high and low water mark, in contradistinction to the Admiralty jurisdiction. That would clearly be too narrow a construction of the words. But then when we get beyond that to the 'deep seas beyond the coast,' a difficulty arises in defining how far they shall extend; and therefore the Legislature seems to have defined it by the words 'fisheries of these kingdoms,' which are words of a large scope, embracing all those fisheries from which fish are supplied in a fresh and wholesome state to the markets of these kingdoms. The act therefore must be taken to mean all such fisheries within the neighbourhood of these kingdoms, which are capable of contributing, and do contribute, to the better supply of the markets of these kingdoms with fresh fish: and all who are engaged in such fisheries, under certain limitations, seem to be within the policy of the act. I therefore think these two persons are entitled to their discharge."

The legal mode of recovering the liberty of a wrongly impressed seaman or other person, is by an application to any of the Courts of Westminster, for a writ of habeas corpus directed to the commander of the ship on board which the aggrieved party is detained. In Scotland, a corresponding practice, by means of a bill of suspension, obtains.[1]

But where the person so brought up by habeas corpus fails

[1] Morison's Dictionary of Decisions, tit. Impress.

to establish his exemption or protection, he is remanded back to the charge of the officer under whose orders he may happen to be placed.

It is necessary, also, before a habeas corpus will be granted, to shew a *primâ facie* case entitling the party aggrieved to his discharge. For every exemption throws the burden more heavily on those who do not enjoy the like privilege; and for their sakes, as well as for the public service, exemptions are construed and required to be proved strictly. The party applying for his discharge must also swear that he has not entered the navy, nor received any bounty money.

Wherever a statutory exemption is claimed, the observance and performance of all conditions or regulations prescribed by the act of parliament are indispensable to the success of the claim. This will appear from the case of John Carruthers[1], an impressed seaman, on board H. M. S. Texel, for whose liberation a writ of habeas corpus had issued. He claimed his dismissal on the ground that he had entered and was serving as carpenter and seaman on board the Experiment, a Greenland whaler, and had been impressed while so on board at sea, on her voyage home on the 30th July, 1807, contrary to the stat. 13 Geo. 2. c. 28. s. 5., one of the acts for the encouragement of the whale fishery. His claim was resisted on the ground that by a later act, 26 Geo. 3. c. 41. s. 17., it was required that the names of all seamen and common mariners, who, after the 1st of February in any year, should enter on board a ship intended to proceed to the fishery in the following season, should be inserted in a list, which was to be delivered to the collector of customs; and every seaman so entered in such list, and giving security to the Commissioners of Customs, to proceed on the voyage, and actually so proceeding, was then to be privileged and exempt from impressment. The Court of King's Bench were of opinion that under the latter act the insertion of the seaman's name in the list was a condition precedent to the exemption; and as this condition had not been complied with in the case of Carruthers, although in every other respect he stood entitled to protection, the

[1] 9 East's Reports, 44.

Court remanded him to his former station on board the king's ship, as a lawfully impressed seaman; Lord Ellenborough at the same time intimating, that if Carruthers had been deprived of his privilege by the default of any other person, he might have his remedy of another sort against such person.

Where a seaman has a valid protection, which happens not to be in his possession, or otherwise producible, at the time when he is pressed, this circumstance does not preclude him from claiming his discharge, though it exonerates from legal responsibility the officer who impressed him. Isaac Pratt's case[1] was an illustration of this rule. He was a mariner on board the Elizabeth, a fishing smack of thirty-seven tons, belonging to Harwich, and had, on the application of the master, obtained a protection from the Admiralty, under the stat. 50 Geo. 3. c. 108. s. 2., which limits such protections to one mariner for every such vessel, besides the master and his apprentices. But when he was impressed on the 6th of January, 1812, there were more mariners on board, and Pratt had not his protection on board. The Admiralty had sent it to Yarmouth, where the vessel was lying when they granted it, but she had sailed before its arrival. These circumstances were mentioned to the impressing officer at the time, and the protection was still in force. The Court of King's Bench held Pratt entitled to his discharge; Lord Ellenborough, C. J., saying, that, however the officer was warranted in taking the man at the time, as he had not his protection with him; yet now, when the question was, whether he was truly entitled to be protected at the time, and it turned out that he really had a protection under the act of parliament, though he had not been able to exhibit it, by reason of the ship having sailed before it reached him, the Court ought to give effect to it by setting him at liberty. And such protection given by the Admiralty under the act, for the individual benefit of the person named in it, could not be abrogated as to him, by the subsequent act of the master, in taking other persons on board.

When a protected seaman is impressed, the subsequent ex-

[1] 16 East's Reports, 167.

piration of his protection before the time when he applies for his discharge, is no bar to his right to relief, as every impressment ought to be good and valid at the time when it takes place. Thus, in Bruce's case, it appeared that he first went to sea in the merchant service, on the 15th July, 1804, and was impressed on the 16th April, 1806, before the expiration of the two years for which new seamen are protected by the act 13 Geo. 2. c. 17. s. 2. Bruce's brother had applied to the Lord Chief Justice for his discharge, on the 18th June, 1806; but the affidavit then made, stating only that Bruce had first gone to sea *about* the 15th July, 1804, it was thought not sufficiently clear that the two years had not expired at the time of the application. However, on the renewal of the application in November, 1806, and long after the expiration of the protection, the facts being verified as above stated, and the argument being pressed, that unless relief could still be obtained, the temporary protection given to seamen might often be violated for want of means of applying in time, Lord Ellenborough, C. J., delivered the judgment of the Court of King's Bench, that an application for Bruce's discharge had been originally made in time, before the expiration of the two years, but had failed from some ambiguity in the affidavit; yet the doubt being now removed, Bruce should have his writ of habeas corpus for his discharge, although the time for protection had expired.[1]

The Court of King's Bench has decided also, that every application for the discharge of an impressed apprentice must either emanate from himself, or be made at his instance, or on his behalf, and for his benefit. Accordingly, in 1804, that Court refused a habeas corpus to bring up the body of John Landsdown, an apprentice, who had been impressed contrary to his right of protection under the act 13 Geo. 2. c. 17.: the application having been made by his master on his own account, in order to retain the services of his apprentice; and Landsdown himself being willing to enter the king's service, and not complaining of his impressment. Lord Ellenborough, C. J. says, " The writ of habeas corpus is for the protection

[1] Bruce's case, 8 East's Reports, 27.

of the personal liberty of the subject. If the party himself, being of competent years of discretion, do not complain, we cannot issue the writ at the prayer of the master, who has his remedy by action, if his apprentice have been improperly taken from him."[1] An action of this nature was afterwards successfully brought against Captain Vandeput in 1785.[2] But the strictest proof of the apprentice's right of exemption will, in such a case, be always required by the Court.[3]

But besides the right to an immediate discharge, the party who has been wrongly impressed has a right of action for damages, in respect of the private injury which he has sustained by the forcible deprivation of his liberty.[4]

When an officer in executing the warrant behaves with unnecessary severity, or gives vent to private spleen or malice towards those who are the subjects of it, the authority of the warrant will not exempt him from being criminally responsible for his conduct. Therefore, where it appeared that Captain Webb, commander of a sloop of war, had exceeded his power, and acted maliciously in impressing Mr. Wager, the master of a merchant ship, to serve as a common seaman, the Court of King's Bench granted a criminal information against Captain Webb.[5]

Impressment being a great infringement upon personal liberty, for which, in general, the law has great tenderness, the utmost regularity ought to be observed in all proceedings under press-warrants; for, as an officer who has no warrant or authority is no legal officer, so an irregular warrant is, in law, no warrant; and if an officer purposely kill a party resisting an illegal arrest, it will be murder. Thus, where a warrant had been directed from the Admiralty to Lord Danby to impress seamen, and one Browning, his servant, without any warrant in writing, impressed a person who was

[1] Landsdown's case, *5* East's Reports, 38.

[2] Eades *v.* Vandeput, *5* East's Reports, 39. note.

[3] Chalmers *v.* Napier, Morison's Dictionary of Decisions, tit. Apprentice.

[4] See Sopwith *v.* Wollaston, 2 Medland and Weobly's Remarkable Trials, 341.; Macdonald *v.* Campbell, Buchanan's Remarkable Cases in the Court of Sessions, p. 60.; Flewston *v.* Role, 1 Campb. 187.; Sabine *v.* Baynes, 2 Campb. 196.

[5] Rex *v.* Webb, 1 Blackstone's Reports, p. 19.

no seaman, and upon his trying to escape, killed him, this was adjudged murder.[1] Dixon's case was to the same effect. There the captain of a man-of-war had a press-warrant, upon which a deputation was indorsed in the usual form to the lieutenant; and the mate with Dixon, and others, but without either the captain or lieutenant, impressed one Anthony How, who never was a mariner, but was servant to a tobacconist; and upon How making some resistance, and for that purpose drawing a knife which he held in his hand, Dixon, with a large walking stick about four feet long, and with a great knob at the end of it, gave How a violent blow on the head, of which he died about a fortnight after. This was adjudged murder. The capture and detention of How were unlawful on two accounts; — first, because neither the captain nor lieutenant was present, and Dixon, in their absence, was no lawful officer; secondly, because How was not liable to impressment.[2]

It is not merely the individual who strikes the fatal blow, that may be thus brought to justice; the whole party assisting in the illegal impressment are equally amenable to the law. This appears from a case[3] in which Midshipman Richard Hanton, and his party of sixteen seamen, belonging to the Charlotte tender, stood their trial for murder committed in the impressment, without a written authority, of a seaman who came to his death in resisting the process. The Charlotte lay off Harwich, and was employed in the impress service. Her commander, Lieutenant Palmer, held a press warrant from the Admiralty; but it contained no power to depute the execution of it to any other officer.[4] On the 7th December,

[1] 1 East's Pleas of the Crown, 312. [2] Ibid. 313.

[3] Rex v. Borthwick, Douglas's Reports, 197.

[4] The warrant was in the following form: — "By the Commissioners for executing the office of Lord High Admiral, &c., in pursuance of his Majesty's Order in Council, dated, &c., we do hereby empower and direct you to impress, or cause to be impressed, so many seamen and sea-faring men, and persons whose occupations are to work in vessels and boats upon rivers, as you shall be able, in order to man his Majesty's ships, giving unto each man so impressed one shilling for prest-money; and in the execution thereof you are to take care that you do not demand or receive any money, gratuity, reward, or other con-

1778, Lieutenant Palmer being the only commissioned officer on board the Charlotte, and having received information that a party of seafaring men were at Ipswich, gave *verbal orders* to Hanton, and the other prisoners, to proceed thither, and to take such men as they should there find liable to be impressed. In pursuance of these orders the prisoners went to a public house at Ipswich, between ten and twelve at night, and with large sticks in their hands, such as are usually carried by press-gangs, in order to seize the men who were there assembled. An affray took place, in the course of which one Nichols came to his death by blows from the sticks: and the prisoners being thereupon tried for murder, the jury returned a special verdict finding all the facts, and leaving it to the Court to determine whether they amounted to murder or manslaughter. The prisoners were finally acquitted *in toto* on technical grounds; but the case deserves notice, because the counsel for the prosecution, having come prepared to argue against the legality of the impressment, the Court of King's Bench intimated at once its opinion that it was unnecessary to agitate that point, because the warrant held by Lieutenant Palmer could not authorise a mere verbal delegation of the power vested in him. It was, for the same reason, admitted also by the counsel for the prisoners, that they were not justifiable in the execution of the warrant, and were therefore trespassers.

From the foregoing cases, it appears that a naval officer holding a press-warrant cannot, under any circumstances, delegate or depute his power to others by a mere verbal authorisation; and that a written warrant is therefore indispensably necessary for the protection of the officer *actually* engaged in the service of impressment.

It is conceived, however, that where the original press-

sideration whatsoever, for the sparing any person or persons fit for his Majesty's service, or exchanging or discharging any person or persons who may be impressed, and also that *every person acting under you* does not demand or receive any consideration whatsoever upon the like account, as you will answer it at your peril. This warrant to continue in force till, &c.; and in the due execution thereof all mayors, sheriffs, &c., are required to be aiding and assisting unto you and those employed by you, as they tender his Majesty's service, and will answer the contrary at their perils. Given, &c."

warrant contains no power to appoint a deputy, it must always be executed by and under the immediate personal orders of the officer to whom it is directed; and that in such a case the execution cannot, upon any account, be delegated or deputed to another officer, either with or without writing.

Where a press-warrant is directed to several officers, any one of them may execute it.[1]

It must be further noticed, as a rule of considerable importance, that either the officer holding the original press-warrant, or the officer duly deputed thereunder, must, *in person*, accompany the men engaged in the service of impressment, so as to superintend and direct the performance of their duty. For otherwise the process is illegal, and the protection of the law is, to a considerable extent, lost; it having been decided that if any man of a press-gang, acting in the absence of the officer appointed to superintend the impress, is slain in the execution of the service, the offence, which, when committed in opposition or resistance to a legal impressment, amounts to murder, is reduced to manslaughter in the person whose liberty is invaded. This is the effect of Alexander Broadfoot's case, which was tried at Bristol on the 30th August, 1743. Broadfoot was indicted upon that occasion for the murder of Cornelius Calahan, a seaman of H.M. sloop Mortar. It appeared that Captain Hanway of the Mortar held a press-warrant[2] from the

[1] 1 Hale, 459.

[2] The warrant was in the following terms: — "By the Commissioners for executing the office of Lord High Admiral of Great Britain and Ireland, &c., and of all his Majesty's plantations, &c.

"In pursuance of his Majesty's Order in Council, dated the 19th day of January, 1742, we do hereby empower and direct you to impress, or cause to be impressed, so many seamen and sea-faring men and persons whose occupations and callings are to work in vessels and boats upon rivers, as shall be necessary, not only to complete the number of men allowed to his Majesty's ship under your command, but also to man such others of his Majesty's ships as may be in want of men, giving unto each man so impressed one shilling for press-money. And in the execution hereof you are to take care that neither yourself, nor any officer authorised by you, do demand or receive any money, gratuity, reward, or other consideration whatsoever, for the sparing, exchanging, or discharging any person or persons impressed, or to be impressed, as you will answer it at your peril. *You are not to intrust any person with the execution of his warrant but a commission officer, and to insert his name and office in the depu-*

Admiralty, which expressly directed that he should not intrust any person with the execution of it but a commission officer; and should insert, on the back of the warrant, the name and office of the person so intrusted. The lieutenant of the Mortar (the only commission officer on board besides the captain) was accordingly deputed by Captain Hanway to impress according to the tenor of the warrant. On the 25th of April, 1743, the Mortar being at anchor in Kingroad, within the port of Bristol, Captain Hanway ordered the ship's boat down the Channel, in order to press as they should see opportunity; but the lieutenant staid *on board with the captain.* Towards evening the boat came up with the Bremen, a merchantman, homeward-bound, at the distance of several leagues from Kingroad. Some of the gang went on board, and, finding that Broadfoot and others of the Bremen's men were concealed in the hold, Calahan, with three other men of the Mortar, went below in search of them. Whereupon Broadfoot (who had before provided himself with a blunderbuss and pistols for his defence against the press-gang) called out and asked them what they came for. He was answered by some of the press-gang, "We come for you and your comrades;" whereupon he cried out, "Keep back, I have a blunderbuss loaded with swan-shot." Upon this the others stopped, but did not retire. He then cried out,

tation on the other side hereof, and set your hand and seal thereto. This warrant to continue in force till the 31st day of December, 1743. And in the due execution of the same, and every part thereof, all mayors, sheriffs, justices of the peace, bailiffs, constables, headboroughs, and all other his Majesty's officers and subjects whom it may concern, are hereby required to be aiding and assisting unto you and those employed by you, as they tender his Majesty's service, and will answer the contrary at their perils. Given under our hands, and the seal of the office of Admiralty, the 31st day of January, 1742.

"Jo. Cokburne.
"By command of their Lordships, "Geo. Lee.
"Thos. Corbett." "J. Trevor.

"I do hereby depute A. B., a lieutenant belonging to his Majesty's ship the Mortar sloop, under my command, to impress seamen, sea-fearing men, and persons whose occupations and callings are to work in vessels and boats upon rivers, according to the tenor of this warrant. In testimony whereof I have hereunto set my hand and seal this day of , 1742."

"Where is your lieutenant?" and being answered, "He is not far off," immediately fired among them. By this shot Calahan was killed on the spot, and one or two more of the press-gang wounded. Upon these facts the Recorder (afterwards Mr. Justice Foster) was of opinion that the boat's crew having been sent out with a general order to impress as they should see opportunity, and having, in pursuance of that order, boarded the vessel without a proper officer, expressly against the terms of the captain's warrant, every thing they did was to be looked upon as an attempt upon the liberty of the persons concerned, without any legal warrant; and he accordingly directed the jury to find Broadfoot guilty of *manslaughter* only.

The like law extends even to strangers opposing, or aiding in opposing, an illegal impressment. For it was laid down by the Lord Chief Justice Holt in Tooly's case[1], where a peace-officer had been slain in the execution of an irregular warrant, that "if one be imprisoned upon an unlawful authority, it is a sufficient provocation *to all people* out of compassion, much more when it is done under colour of justice: and where the liberty of the subject is invaded, it is a provocation to all the subjects of England. A man ought to be concerned for Magna Charta and the laws. And if any one against law imprison a man, he is an offender against Magna Charta." It is apprehended that this doctrine is equally applicable to the case of illegal seizure or detention under a press-warrant.

It will be observed that the form of the press-warrants enjoins the officer charged with the execution of it not to demand or receive any money, gratuity, reward, or other consideration for sparing, exchanging, or discharging any person or persons impressed. A case bearing upon this point occurred in 1782[2], where the officer of impress had discharged one John Cooper, upon the security of a bond given by one Horrobin, to compel or procure Cooper to appear and deliver himself to the officer when called upon. Cooper was not

[1] Foster's Crown Law, 313.

[2] Pole *v.* Horrobin, 3 Douglas's Reports, 91.

forthcoming when required, and an action being brought against Horrobin to enforce payment of the bond, he pleaded the irregularity of the whole transaction. And this defence was supported by the Court of King's Bench. Lord Mansfield says, "How dare an officer, when a man is impressed, let him go? How can he know when his services will be wanted. It is like a sheriff letting a prisoner go."

The principal points, therefore, to be noticed, with respect to the execution of press-warrants, are, —

1. That the persons impressed are seamen, &c. within the terms of the warrant, and not protected by any exemption or protection.

2. That where the power is authorised to be delegated, the deputy be a proper officer and be always appointed by writing.

3. That a mere verbal authorisation of a deputy is insufficient and illegal.

4. That a deputy cannot be appointed, where the original warrant contains no power for that purpose.

5. That the officer to whom the original warrant is directed, or his deputy duly appointed, must accompany the press-gang.

6. That no favour or partiality be shown, nor spleen be indulged.

7. That no outer doors be broken open without the warrant of a magistrate.

8. That no unnecessary violence be used upon any occasion.

Such are the liabilities of officers, and others, engaged in the execution of press-warrants.

On the other hand these parties have their rights and privileges, which will be briefly considered.

Officers and men engaged in the service of impressment are, while acting within the due limits of their authority, in the same legal position, and entitled to the same legal protection as ministers of justice, bailiffs, constables, &c. The killing of such persons, while so employed, has been deemed murder of *malice prepense*, as being an outrage wilfully committed against and in defiance of the public justice of the

kingdom. This rule is not confined to the moment an officer is on the spot, or at the scene of action, engaged in the business that brought him thither; for he is under the same protection of the law *eundo, morundo, et redeundo;* and, therefore, if he come to do his office, and meeting with great opposition retire and be killed in the retreat, this will amount to murder: as he went in obedience to the law, and in the execution of his office, and his retreat was necessary in order to avoid the danger by which he was threatened. And upon the same principle, if he meet with opposition by the way, and be killed in overcoming it, before he reach the place or scene of action, this likewise will amount to murder.[1]

According to Mr. Justice Foster, "the person having authority to arrest or imprison may repel force with force, and if death ensueth in the struggle, he will be justified. This is founded in reason and public utility. For few men would quietly submit to an arrest, if, in every case of resistance, the party empowered to arrest was obliged to desist, and leave the business undone."[2]

"The case" (says the same learned writer) "of bare flight, in order to avoid an arrest in a civil proceeding, and likewise in some cases of a criminal nature, will fall under a different consideration. A defendant in a civil suit, being apprehensive of an arrest, flieth; the officer pursueth, and in the pursuit killeth him. *This* saith Lord Hale, *will be murder.* I rather choose to say it will be murder or manslaughter, as circumstances may vary the case. For if the officer in the heat of the pursuit, and merely in order to overtake the defendant, should trip up his heels, or give him a stroke with an ordinary cudgel, or other weapon *not likely to kill,* and death should unhappily ensue, I cannot think that this will amount to more than manslaughter, if, in some cases, even to that offence. The blood was heated in the pursuit, his prey a lawful prey, just within his reach, and no signal mischief was intended. But had he made use of a deadly weapon, it would have amounted to murder. The mischievous vindictive spirit, the

[1] 1 Russell on Crimes, 532.

[2] Foster's Crown Law, 270.

malitia, which always must be collected from circumstances, determines the nature of the offence."[1]

But though an officer may repel force by force where the exercise of his authority is resisted, and will be justified in so doing, even though death should be the consequence; yet he ought not to come to extremities upon any slight interruption, nor without a reasonable necessity. For if he should kill where no resistance is made, it will be murder; and it is presumed that the offence would be of the same degree, if he should kill a party after the resistance is over and the necessity has ceased, provided that sufficient time has elapsed for the blood to cool. So where a party flies from the officer endeavouring to impress him, or after an impressment actually made, and the officer (not being able to overtake him) makes use of a deadly weapon, and by so doing, or by other means, intentionally kills him in the pursuit, it will amount to manslaughter at least. In such cases, however, attention would be paid to those usages which have prevailed in the sea-service in this respect, so far as they are authorised by the Courts which have ordinary jurisdiction over such matters, and are not expressly repugnant to the laws of England.[2] The usages of the navy were thus taken into consideration on the trial of Rowland Phillips, a midshipman of H. M. S. Princess Royal, who was indicted at the Exeter Assizes in 1778, for the murder of a seaman named William Collier, in the execution of a press-warrant. The jury returned a special verdict, finding all the facts, and submitting to the judgment of the Court whether they amounted to murder or manslaughter on the part of Phillips. The substance of the verdict was as follows: "An Order of Council for impressing seamen: a warrant made in consequence of it to Captain Milbank, of H. M. S. Princess Royal, who by indorsement deputed John Nasmith, fourth lieutenant of the same ship, to execute it: William Collier, the deceased, was a fisherman: Phillips was a midshipman belonging to the Princess Royal, and on the 25th September, 1777, was sent to the brig Hope (a tender),

[1] Foster's Crown Law, 271.

[2] 1 Russell on Crimes, 544.

commanded by Lieutenant Nasmith, into Torbay to impress seamen; Phillips went from the tender into a boat, by direction of the lieutenant, to put people on board the fishing-boats as they returned from sea, who might carry them under the stern of the tender, that the lieutenant might examine whether they had any protections. Phillips put Graham, a quarter-master, on board the boat or smack of Collier, the deceased: the smack at first made a feint of proceeding towards the tender, but, instead of continuing in that course, she afterwards put out to sea with Graham on board; Graham then waved his hat, by way of signal of distress, and for assistance; upon this Phillips went on board another fishing-boat, with the quarter-master as his assistant, armed with a musket and ball and two cutlasses, and gave chase to the deceased for three hours, in the course of which time Phillips fired six or seven shots, at the distance of a quarter or half an hour between each, *for the purpose of bringing the smack of the deceased to:* the halyards of the smack had been cut by Graham, and the smack was in the act of lying to; when *within the distance of sixty yards* Phillips fired a musket loaded with ball, *the sea running very high*, and shot the deceased on the left side of the head; Graham was at that time standing close to the deceased. Phillips said, 'If they would not bring to, he would fire at the man at the helm, but if he could get Graham out of the helm he might go to hell.' Before Phillips fired, the master of the Industry fishing-boat desired him not to fire, but Phillips did fire, the deceased fell, and then one John Desert said, 'You have killed a man;' upon which Phillips said, 'Do you think I meant it?' Before the last firing a struggling was seen between Graham and the deceased, and there was an apprehension that Graham would have been thrown overboard; a hat and four bludgeons were seen floating on the sea. Phillips fired from a musket loaded with ball, *as is usual in the navy*, to bring the smack of the deceased to, and to hit the halyards." Lord Mansfield, Chief Justice: "It is impossible on this special verdict to say that the defendant is guilty of more than manslaughter; for it is expressly found that he fired in the *usual* manner to bring vessels to, and to hit the halyards." Whereupon (adds

the Reporter) the defendant Phillips was immediately arraigned, and, upon praying the benefit of clergy, Mr. Justice Willes pronounced the sentence of burning him in the hand, which was executed in the face of the Court, and he was then discharged.[1]

With the warrant of a magistrate, outer doors and windows may be broken in order to effect an impressment of the owner, or occupier, or any other person subject to that liability; and this arises from the necessity of the case as founded on the public welfare, which would be sacrificed by allowing any obstacle of this nature to defeat the execution of the warrant. But before proceeding to this extremity the business of the officer should be notified, and peaceable admission demanded and refused.[2] Where the personal liberty of the subject is invaded by the law on grounds of public necessity, the maxim that a man's house is his castle ceases to require the observance which it otherwise demands.

ART. III. — CONVEYANCING REFORM. — A LAND TRIBUNAL.

Second Letter to the Right Hon. Sir Charles Wood, Bart., M. P., upon certain Laws affecting Agriculture. By FREDERIC CALVERT, Esq., Q. C. [M. P.] Ridgway: 1850.

THE only real difficulty in the way of that ready transfer of land which is now demanded alike by peer and peasant, consists in the fetters in which the owners of land have themselves bound the land. Year after year this system goes on: son succeeds to father, submitting himself to the like restrictions, so that the great mass of the land of this country is owned by tenants for life, and cultivated by tenants at will. With the main pillar of this order of things — the giving the land exclusively to the eldest son — we have

[1] Cowper's Reports, 830.

[2] Foster's Crown Law, 320.

no wish to interfere. This is a point that all can understand; and if, as a whole, it was not agreeable to the wishes and habits of the owners of land, it would be altered. At each successive settlement, the parties have the power of considering this matter, and if they adhere to the practice, it is because they find it convenient. But there are many other points connected with settlements, of which the landowner is comparatively ignorant, and which vitally affect his enjoyment of the land. He succeeds to his estate, the bells ring merrily on his arrival at his "Hall," or "House." He is the undoubted proprietor of a large number of acres; he is the landlord of a numerous tenantry; he is squire and magistrate, and succeeds to all the hereditary honours enjoyed by his ancestors before him; he is called upon to take his place in the village or in the county; his name is looked for in all subscription lists and public undertakings; his land is charged not only with many burdens for public purposes, for State and Church, but also with many payments, annual and otherwise, for other members of his family; widows require jointure, and younger children portions; and, after payment of all these, he, the head of the house, has often little left to him but the honour and the rank. If any fresh burden is placed on the land, he must provide for it; if any change is made in the law, depreciating the produce of the land, he must suffer for it. His only consolation is that he has helped to place the chains in which he finds himself on his own limbs; he has created the law under which he suffers, and if he attempt to get free, the lawyer in the next village shows him his "settlement," signed with his own name. Now here we come to the root of the evil. This settlement may have been well prepared, but it may not. It may contain all the usual clauses and powers, or some or one of them may be omitted, or if inserted in the settlement, they may have been so ill prepared as not to be *workable*. But one objection even more formidable to the settlement system, is that although all the usual powers and clauses are inserted, they may be, and frequently are, utterly inadequate to meet the exigencies of the case. How often, in the history of most estates, has this piece of parchment been unfolded, and after

a careful examination and comparison of its provisions, after perhaps a case prepared, and counsel consulted, it has been returned to the deed-chest again, and the owner of the land has remained unrelieved. Difficulties of title, difficulties of construction, have arisen; the doubts of the learned are worse than the guesses of the ignorant; the wise men have only made that more dark which was before sufficiently obscure; and the conclusion to which all persons interested come to is that "nothing can be done;" or, at all events, that the *pis aller* of all such consultations — an act of parliament — is the only thing attainable.

Now we have no hesitation in saying, that a very large portion of the whole land of England (in Ireland they have found a temporary mode of getting rid of some of these difficulties) is thus situated: the parties in possession are tenants for life, with very inadequate powers of dealing with the land; that these powers can only be extended by the very clumsy and expensive machinery of a private act of parliament, and that this mode of relief is often unattainable. Now, is there any remedy for this state of things? If not, it is quite clear that many landowners, in the present pressure and reduction of prices in the produce of land, must be ruined.

In this state of things, Mr. Calvert has renewed his application to the Government to give the proper attention to the subject, and we think he has much improved his recommendations. In his first letter, which we noticed some time ago, he offered five suggestions:—"*First*, that tenants for life should have the power of borrowing money for other permanent improvements as well as for draining; *secondly*, that tenants for life should be empowered, *under proper safeguards*, to sell so much of the settled estates as would be sufficient for the discharge of the settlement-incumbrances; *thirdly*, that tenants for life should have general powers of sale and exchange, with a view to the consolidation of estates; *fourthly*, that tenants for life should have power of leasing at rack-rent for twenty-one years; *fifthly*, that there should be a register of title." (P. 1.) Many of these propositions resolve themselves into a suggestion nearly similar

in form to one which has already been repeatedly made,—that of clothing tenants for life with the powers necessary for the proper management of the land.[1] But Mr. Calvert, in his first letter, suggested that the Court of Chancery should be employed as the tribunal for carrying this proposal into execution. Against this we protested at the time[2]; and we are glad to see that he now proposes the Inclosure Commissioners. We are satisfied that this latter tribunal would be much more available for the purpose, and more popular with the landowners. Mr. Calvert now renews his proposal, as to which the events which have occurred have supplied some important materials. First, as to allowing tenants for life to borrow money for the construction or improvement of farm buildings. A clause of this nature was brought forward by the Chancellor of the Exchequer in committee upon "The Drainage of Land and Improvement Bill."

"The objections raised were principally these: that tenants for life would object to the inspection of their buildings by Government inspectors; that they would omit to keep the new buildings in repair; that they could not be compelled to insure; and that they would very probably construct buildings for some arrangement of farms, which might ultimately prove injurious. Upon the first I must observe that some inspection is indispensable as a protection to remainder-men, and that the Government inspection, with regard to the drainage and other works authorised under the existing acts, has never been made ground of complaint. Moreever, if there be any landowners, with whom this objection has weight, they may abstain from exercising the power offered to them; but their fastidiousness is no satisfactory reason, why such a power should not be conferred upon others who wish to purchase the benefits of it at the price of an inspection. To the second objection it will, I believe, be a sufficient answer, that new buildings require during the first twenty-two years very little repair; and that the little repair that is required will be inexpensive, and may safely be left to the self-interest or proper feeling of the tenant for life. I must observe upon the third, that the payment of insurance, if judged necessary, may be enforced with

[1] See this subject fully discussed, 11 L. R. 1—26. The Irish Act, 12 & 13 Vict. c. 26., there alluded to as a *bill*, has since passed.

[2] 11 L. R. 443.

the same facility, as that of the instalments of the principal advanced and of the interest.

"The last objection cannot carry much weight, except upon a general distrust of landlords of the generation for the time existing. Every landlord who engages in farm improvements, whether he work with his own or with borrowed money, studiously pursues his own interest in the anticipation of the enjoyment of his property for some considerable period. He acts with forethought and with good advice. Legislation will be in conformity with sound sense, if it proceed upon the general supposition that a landlord acting under these circumstances will not make alterations injurious to his successors." (Pp. 4, 5.)

"It is not unimportant that this suggestion meets with the approbation of a landowner, who entertains the opinions, and occupies the position, of the Duke of Richmond. On the 2nd of July, 1849, his Grace 'laid on the table of the House of Lords a bill which he had prepared, to carry out the recommendation of the Committee on Entailed Estates. The object of it was to authorise the owners of landed property to borrow money on their estates for the purposes of drainage. He thought it desirable that the bill should also contain provisions enabling them to raise money *for the improvement of farm buildings, and labourers' cottages,* and enabling persons on removing from their farms to dispose of any buildings which they might have erected upon them: but to those propositions the committee had not yet acceded. He thought that a bill of this kind would be eminently useful."— *Times, July* 3. 1849.

It is then shown that this power is given to landowners in Ireland, by the 13 & 14 Vict. c. 31. s. 8. The author then commends his second suggestion to the notice of the Government.

"With regard to the second suggestion, one doubt which formerly arose has been effectually removed. The experience of Ireland has taught us, that sales may take place at the desire of the tenant for life, without injury to persons having subsequent interests. The number of petitions or applications for sale under the Incumbered Estates Act, between the 17th day of October, 1849, and 1st day of August, 1850, the entire period of the working of the Commission, was 1085.[1] Of that number 177 were presented,

[1] See the Dublin University Magazine for September, 1850.

not by creditors, but by landowners. Thus the machinery has been tested. The scale of prices which have been realised has in many instances exceeded the supposed scale, because the property has been purchased subject to a heavy arrear of poor rate, or to other serious drawbacks, which have not appeared in the published statements. But this scale, as it has been determined by the peculiar circumstances of Ireland, can in no way affect the policy of the measure which I am recommending. The only point material to the present purpose is the proof by actual experience, that in extensive transactions of this nature it is possible to respect rights and interests, present and prospective, of every variety." (Pp. 14, 15.)

With respect to the third and fourth suggestions, Mr. Calvert says, that he is not aware that "the propriety of either of these suggestions has ever been called in question." "A law connecting these powers with a tenancy for life would only give a slight increase to the powers incidental to that estate, without putting any interest into jeopardy." The fifth suggestion is strengthened by the Report of the Registration Commissioners, of which we have already given a full account. We agree with Mr. Calvert in the following remarks: —

"I am sure that you will be conferring a great boon upon the agricultural interest, if you will exercise all your influence in favour of the recommendation of the Commissioners. There will probably be a great controversy upon the question, whether there should be one such register for the whole kingdom, or separate registrations for separate districts. I trust that you will not allow this controversy to deprive us altogether of a registry system. All interests, trading as well as agricultural, but especially the agricultural interest, have already suffered abundant loss and inconvenience through the want of a register. It is high time to put an end to these evils. The agricultural interest in England have also had great reason to complain of the want of a map of England, large enough in scale, and accurate enough in detail for all statistical purposes. While a map of all Ireland has been completed, on the scale of six inches to a mile, the survey of the southern counties in England has been only at one inch to the mile, and the map, at six inches to the mile, for the six northern counties, has but recently been commenced. If the establishment of a general register includes the completion of a map of England

upon this scale, it will bring with it an important advantage, to which the agricultural interests are justly entitled." (Pp. 16, 17.)

With reference to the suggestion, that a tenant for life should have power to sell a sufficient quantity of land for the discharge of settlement incumbrances, Mr. Calvert states the following case, which presses fully as hardly where there is a smaller amount of property: —

"The net annual rental is about 80,000*l.* The interest of settlement debt is about 60,000*l.* Therefore the present owner, who is tenant for life, has 20,000*l.* a year subject to the expenses of agency and other estate expenses. These expenses of course extend over the entire estate. I will put them on a very moderate scale at 5*l.* per cent., or 4000*l.* a year. On this favourable calculation the tenant for life has a net annual income of 16,000*l.* Such is the income upon which he is to maintain the position of a man who has, as he ostensibly has, the *bonâ fide* proceeds of this immense property.

"I am not wrong in assuming that a man who has his property invested in land, cannot be considered to realise more than 3*l.* per cent. If it is placed in securities and other investments, he may realise 4*l.* per cent.

"If, then, this tenant for life were to sell so much land as now pays the interest of the settlement debt, that is, so much as now yields annually 60,000*l.*, he would realise about 2,000,000*l.*, of which, as his mortgagees must be supposed to make 4*l.* per cent. on their mortgages, 1,500,000*l.* will pay off the entire principal of the debt. There will remain 500,000*l.* to be reinvested. Therefore, after the sale, his position will be this. He will have

As income upon the original estate - - - - -	£20,000
3*l.* per cent. upon 500,000*l.*, reinvested in land - - -	15,000
Gross income	35,000
Subject to 5*l.* per cent for management of an estate worth 35,000*l.* annually - - - - - - - -	1,750
Net income	£33,250

"He will gain annually by the transaction, the difference between 33,250*l.* and 16,000*l.*, or 17,250*l.*

"Can there, I ask, without repeating the topics which I urged in my former letter, be one tittle of doubt, that a tenant for life

placed in these circumstances ought to have a power of sale co-extensive with the settlement incumbrances? I can discover no real advantage, public or private, in the continuance of his vast imaginary ownership. On the contrary, the evils of it are too glaring to escape a moment's observation: yet the law binds him by the fetters of this over-grown inheritance." (Pp. 24, 25.)

Mr. Calvert thus further adverts to leasing powers: —

"I recur to the subject of the power of leasing at rack-rent, that I may suggest the propriety of conferring a further power upon a tenant for life. The disadvantage of the common lease is, that it is in practice a one-sided agreement, unless ample securities are taken for the payment of the rent. It binds the landlord but not the tenant; because the land is sure to remain *in statû quo;* but, if the tenant, from any cause whatsoever, ceases to pay his rent, it is rarely worth the landlord's while to support his different claims by litigation; the course most advantageous for him is to put an end to the lease But if the tenant were during the first year of his lease, to lay out capital in improving the premises, the outlay would be a motive to him for fulfilling all his obligations, and continuing tenant during the entire term. The lease would then be a contract, of which the complete performance would equally be for the interest of both parties. I therefore propose that a tenant for life should have power to make a lease for twenty-one years, at an uniform rent, the tenant covenanting to lay out a certain sum in improvement, with the landlord's approbation, during the first three years of the term. The security of the remainder-man's interest is the only point to be considered. I would allow him to set aside the lease, if he could show that the tenant for life had received any fine, or any consideration in the nature of a fine, for the lease; or if he could show that the lease was in any way fraudulent upon himself. The evidence upon such a question would be easily obtained. But I should further add, that there ought to be a power in the first instance of placing the lease beyond all dispute, by referring it to the Inclosure Commissioners, or to some authority named by them. An arrangement of this nature would, I believe, open to all parties concerned, the landowners, tenants, and labourers, and to persons trading in the neighbourhood, a prospect of all the numerous advantages which arise from agricultural improvement." (Pp. 28, 29.)

A further allusion is made to the tribunal to whose care these matters are to be committed.

"I am aware that some of my suggestions would throw very important duties on the Inclosure Commissioners. They would render those Commissioners the guardians of the interests of remainder-men, against the imposition of any improper charge by a tenant for life, under the plea of a permanent improvement. But this is a duty which these Commissioners are already discharging under different acts of parliament, and which the officers of the Board of Works in Ireland are discharging in almost every particular which I have mentioned. Ireland indeed, under the present very able administration, is taking the lead of England in the laws which affect agriculture. We there see to what an extent of evil an agricultural system may be brought. We also see what relief and appliances a happy genius for legislation is able to provide. It is not too much to ask, that legislation may be conducted for England as favourably as it is conducted for Ireland.

"There are persons who strongly object to the principle of the Irish Incumbered Estates Act. I ask you to take the readiest means of rescuing England from the enactment of a similar statute. That it may never become necessary to arm creditors with a compulsory power, confer without delay a voluntary power upon the landowner who is tenant for life. Furnish every landowner with the means of obtaining the fullest information upon the agriculture of the country; enable him in his own person or by means of his tenantry, to set on foot the best system of cultivation; simplify the title to his land, and facilitate all his acts of transfer. To difficulties of soil and climate our farmers ever have been and ever must be exposed. They now encounter a vigorous competition. Do not render their difficulties insurmountable, by the continuance of legal restrictions which are totally unnecessary. The habits of the nation, their interests and inclinations, are in accordance with the system of family settlements. Yet in that system there are certain defects which diminish the opportunities of agricultural improvement, check the employment of labour, reduce the farmer's profits, and impoverish the landowner. For these defects provide an antidote by wise and timely legislation." (Pp. 38—40.)

In conclusion, Mr. Calvert says: —

"It is the main object of my suggestions, that there may be no part of our law at variance with the improvement of agriculture, I am convinced that, while the system of family settlements is preserved, the incidental defects may be obviated with perfect safety to the interests of all parties; that, while the labourer is thriving in active industry, and farmers are vying with one another in suc-

cessful enterprise, families may remain established in their old inheritances; and that through a slight alteration of our law, the descent of land from father to son may be accompanied with the general prosperity of all the successive cultivators of the soil." (Pp. 41, 42.)

We think that these suggestions are well worthy of attention. It is the bounden duty of the State to give all possible relief to the landowner. There is, perhaps, nothing novel in Mr. Calvert's suggestions, but they take a practical form, and as coming from a gentleman of character and station at the Bar, we are sure they will meet with attention. We are glad also to perceive that since he published this letter, he has been returned to Parliament for Aylesbury. He will now have an opportunity of enforcing his opinions in that place, where they can be listened to with effect. We think he is also right in abandoning, for the purposes to which he refers, the Court of Chancery, and adopting a board already established, which has for some time dealt in its own manner with many intricate questions connected with property, safely, cheaply, and successfully. If too little knowledge is sometimes dangerous, too much is occasionally fatal. All that is wanted on the points here to be dealt with, is good common sense, a knowledge of business and of mankind, and these the Inclosure Commissioners appear to possess. If technical knowledge is thought necessary, they may be strengthened in that particular, but we apprehend that they have already had to decide on questions, and to encounter difficulties which would have made a Master in Chancery turn pale, and puzzled a Lord Chancellor; but they have steered clear of rocks on which many a goodly property has foundered. We want a Land Tribunal, really adapted to give relief where it is wanted, and not to feed its retainers with the corpus of the property brought within its jurisdiction. If such a one can be found, enough will be given it to do. If it can set free the land from all those artificial distinctions, and pedantic questions which now embarrass its alienation and obstruct its real enjoyment, an incalculable service will be done to the whole country, and that more especially to the landed interest.

ART. IV.— CULTIVATION AND PROGRESS OF THE LAW OF SCOTLAND.

[PART SECOND.[1]]

From the Union of the Crowns to the Legislative Union of the Kingdoms of England and Scotland.

WE proceed to the progress of the law during the 17th century; and certainly during the remainder of the reign of James VI., after his accession to the English throne in 1603, the general prosperity of Scotland was not advanced. The attempt to accomplish a legislative, or at least a more complete union, than what arose from the accession of the king of the smaller to the throne of the larger realm, was so far premature, and proved a failure. The attempt to support Episcopacy, contrary to the wishes of the great body of the people, was a very unwise measure; and the religious persecutions which were the consequence, most unjust. Trade and manufactures received no material encouragement; and the fisheries no other encouragement than the perhaps unnecessary and useless prohibition and exclusion of foreigners. The attempt to colonise the Western Isles likewise proved a failure. And the only successful public measures, during this period, appear to have been the encouragement given to a large portion of the Scotch population to emigrate and settle in the north-west of Ireland, in the province of Ulster; the pacification of the borders of the two kingdoms; and the subjugation of a barbarous tribe in the West Highlands, though the last two of these objects might perhaps have been effected with less severity, and less waste of human life.

The delegated description of government, occasioned by the accession of James to the throne of the larger kingdom, was itself an evil for Scotland. And this was vastly increased by the weak and over-weening attachment of James to favour-

[1] See Part I. 12 L. R. 265.

ites, in the choice of whom he showed no discrimination, and who were in general either originally worthless or soon became so. The elevation of the favourite, Captain Stuart, to the Earldom of Arran, and the entrusting him with the government, proved a disgrace to the country.

The administration of the government, under the next favourite minister, the Earl of Dunbar, as observed by Mr. Laing, though more decent, than under the Earl of Arran, was not more pure, as appears from the attainder of Logan of Restalrig, and that of the Earl of Orkney, began by Dunbar, and followed out by the next royal favourite, Carne, created Earl of Somerset. And even Elphinstone, Lord Balmerino, while he stoutly opposed the corrupt influence attempted to be used by the Earl of Dunbar on the Bench, himself scrupled not to combine in his own person the two rather incompatible offices of Secretary of State, and President of the Court of Session.

Yet during this inauspicious period, two institutions were established, which have proved highly conducive to the safety of the proprietors and purchasers of lands, and of creditors holding securities over such lands — the institution, in 1617, of the Public Register of Land Rights, and the Positive Prescription of Forty Years, in such Real Rights; following up the Negative Prescription of Obligations, after the lapse of forty years; which Negative Prescription had been previously established in 1469 and 1474.

To what statesman or lawyer, Scotland was indebted for these salutary institutions, does not distinctly appear. The abilities of Elphinstone, Lord Balmerino, who was President of the Court of Session in 1605, as well as Secretary of State, are represented as great, and adequate to the conception and completion of such measures. But he appears to have been more occupied with political affairs, and the pursuits of ambition and avarice. And the merit of these beneficial measures may perhaps with more probability be ascribed to Sir Thomas Hamilton, who, after receiving a legal education in France, as was the usual practice in these times, was appointed an ordinary Lord of Session in 1592, and took the title of Lord Drumcairne. In the same year, he was included in the Com-

mission for revising the Statutes; in 1604 was named one of the Commissioners for the projected Union of the Kingdoms; in 1612 was nominated Clerk Registrar, on the resignation of Sir John Skene; was President of the Court of Session from 1616 to 1626; and was raised to the peerage by the titles, first of Lord Binning and Byres, afterwards of Earl of Melrose, and ultimately of Earl of Haddington. Finally, as Mr. Cosmo Innes informs us in the volume of the Scotch Statutes printed in 1844, "he was well known as a zealous student of legal and constitutional antiquities."

We have seen, indeed, that during the 15th and 16th centuries, the Government of Scotland had all along manifested a strong disposition to attend to the public records of feudal titles to land, — chiefly for the interested purpose, no doubt, of ascertaining the tenants *in capite* of the Crown, with a view to annual rents or duties, feudal casualties, and frequent forfeitures. And the Clerk of the Register was in Scotland one of the minor officers of State. By the act 1617, c. 16., a public national register was established, in which all *reversions*, and other rights affecting land, absolute, conditional, or contingent, and all instruments of seisin, were required to be registered within sixty days after the date of the same, under certification, that otherwise they should make no faith in judgment, by way of action, or exception, in prejudice of a third party, who has acquired a lawful right to the subject; reserving the effect of these writs against the granter, his heirs and successors; and this enactment was, at a distant and long subsequent period, when it came to be found requisite, extended by the act 1681, c. 11., to houses, lands, and other tenements in royal burghs, so as to embrace all local registers in the kingdom.

It seems to be an idle inquiry, whether prescription rests on the Law of Nature, as it has been called, or on Positive Municipal or Internal Law. Those who deny it rests on the Law of Nature, seem to understand by that term certain rules, which are adopted by, or adapted to, mankind, at a certain stage of civilisation, rather rude, as very refined. On the other hand, it is plain, the laws which regulate the progress of mankind in civil society, independently of their will or act,

are applicable to the more advanced, as well as to the earlier stages of civilisation. In short, by the Law of Nature, it is at all times generally just, and universally expedient, that the disputed claims of men should cease, and the rights be held, as ascertained and established by the lapse of a long period, without challenge. And it is left to the positive or Municipal Law of each state to fix the exact period.

In Scotland, while the Negative Prescription of forty years, against claims moveable or personal, was introduced in the 15th century by the acts 1469, c. 28., and 1479, c. 54., the Positive Prescription of Rights to Land was established by the act 1617, c. 12. By this act, continued possession for forty years, without interruption, in consequence of an infeftment, was declared to give an unquarrelable right, good against all mortals, and against all objections, falsehood only excepted; and to this effect, it was declared sufficient for the party to produce for his title, either a charter and seisin of the subject, or instruments of seisin, one or more, continued and standing together for the space of forty years preceding, either upon retours or upon precepts of Clare constat,—that is, upon writs, in which the propinquity and right of succession have either been ascertained by an inquest or jury, or have been attested by the feudal superior, the person having an adverse interest, as a matter of common notoriety.

During a reign marked by so many imprudent and unjustifiable measures, as that of the unfortunate Charles I., extending from 1625 to 1649, much improvement in the Municipal Law or Internal Jurisprudence of Scotland, was not to be expected. Like his father, Charles I. seems to have thought he was at liberty to use the additional power acquired by him, through his accession to the throne of England, for the purpose solely of curbing and restraining the nobles and landed aristocracy of Scotland, without availing himself of the means and opportunity thereby afforded him, of establishing a better regulated government. The revocation of all the grants made during the two preceding reigns, of Rights to Church Lands, and Infeftments of Erection of Abbacies, Prelacies, &c., though perhaps justifiable according

to the previous constitutional practice of Scotland, was an imprudent measure, and excited against the king a large portion of the landed aristocracy, who had reaped the benefit of such grants. And even the arbitration by the king, under the subsequent submission by the clergy, the lay heritors, and the burghs, relative to the valuation and sale of the teinds or tythes, did not at this time give general satisfaction; although it may afterwards have proved beneficial, as securing a moderate provision for the ministers of the Presbyterian establishment, finally settled at the revolution of 1689. On the other hand, the perseverance in the attempt to restore or continue the Episcopacy, if not Roman Catholic worship, the extravagant support of the prelates, and the attempts to enforce upon the people the canons and liturgy, disgusted and enraged the middle and lower classes of the community; and led first to supplications, next to the revival of the institution of the Covenant, resistance to the Crown, and civil war, and ultimately to those events, which in England terminated in the death of the king.

But it is unnecessary to dwell on the events of this lamentable period, and it is some satisfaction to find, that even during that period the cultivation of the Civil Consuetudinary Law was not neglected, and that the establishment of the College of Justice had some effect in improving the jurisprudence of the country. Although the advice which Sir Thomas Hope, of Craighall, advocate to King Charles I., gave that sovereign, with regard to the revocation of the grants of church lands by his two immediate predecessors, however justifiable otherwise, was very imprudent, there can be no doubt, that Sir Thomas was an able lawyer; and it is to be regretted that the man who, in such an age could, while he was dressing in the morning, compose such a good treatise as the Minor Practices, chiefly on the Feudal Law as adopted and practised in Scotland, not for publication, but for the "instruction of his son," did not devote more of his talents and time, to the improvement of the Law of his country. In addition to the Minor Practices composed by the Lord Advocate, no fewer than three judges of the Supreme Court reported the decisions of that Court, at considerable

length, during the period from 1621 to 1642, — Sir Alexander Gibson, of Durie, afterwards Lord Durie, Sir George Auchinlech, and Sir Robert Spottiswoode. And certainly one of the chief means of developing and improving the Common Consuetudinary Law of a country is the recording and publishing of the decisions of its Supreme Court or Courts, as affording a salutary check and control over the present judges, and an example and precedent to guide future judges.

The loyal feelings of the Scottish people were, naturally enough, roused to indignation and resentment by the condemnation and execution of their hereditary sovereign, without their having been consulted. But the estates of the kingdom were thereby placed in a critical, difficult, and perilous situation. For the immediate recognition of the son of Charles, as king, might even then have been foreseen as a measure not likely, in the circumstances, to be conducive to the permanent welfare of Scotland. Charles II. himself appears to have viewed the throne of Scotland merely as a stepping-stone to the acquisition of the crown of England. But the plan of the Scotch attempting to conquer England for the purpose of placing Charles II. on the English throne was very hopeless, as it afterwards proved. Nearly as little expectation could be reasonably entertained of any salutary and permanent legislative, or federal union, being effected between the kingdom of Scotland and the republic or commonwealth of England. Almost all the Scotch could reasonably hope for was, as hitherto in former ages, to defend and maintain Scotland as a separate and independent kingdom. But the chances of their success, if they had adopted this measure, which occurred on several occasions, were lost by the deceitful conduct of Charles and the very imprudent conduct of his supporters — by the internal dissensions, and the collision, of the factions into which the nation was divided — by the jealousy of the leaders of parties, and by the imprudent exercise, on one noted occasion, of the influence possessed by the Presbyterian clergy over the people. The result was the subjection of the Scottish people, for a time, to a more oppressive and degrading tyranny, than they had ever

endured. Their national records were swept away a second time. The people groaned under a military government, till the royalists were suppressed. The whole civil administration was then vested in a Council of State, resident in Scotland, but composed almost entirely of Englishmen, and subordinate to the Protector Cromwell and his council in England.

An attempt was next made to form a parliament, or representative body, including Scotland; and by the instrument in which Cromwell was declared Protector, the representation of Scotland was increased from five to thirty members, but twenty only were returned to Parliament. An ordinance was then passed, uniting and incorporating the two nations into the same commonwealth, exempting the commodities of each from imposts when imported into the other, abolishing vassalage and the whole incidents, services, and confiscations exacted in Scotland, and suppressing the hereditary territorial jurisdictions, into which the country was divided. The returns were more complete in the succeeding parliament; but, as Mr. Laing observes, "the representatives were Englishmen, holding office under Government, or a few temporising Scotchmen, in whom the Protector could confide."

Further, not only the legislative and administrative branches of the Scottish government, but also the judicial, were swept away. The Court of Session was suppressed and a new Supreme Court established, consisting of four English and three Scottish judges, that the former might have a majority such as to prevent the corruption and partiality of the latter to their allies and friends, and such as was likely gradually to assimilate the laws and judicial proceedings to the practice of England. The English Commissioners could not, of course, be acquainted with the laws, usages, and judicial practice of Scotland; and the administration of justice, it appears, was slow but vigorous and sensible, and impartial in questions between individual Scotsmen, when there was no inducement to decide otherwise.

To this degrading control the Scottish people submitted for ten long years, apparently ashamed; and waited in sullen impatience for the event, which in the course of nature, be-

hoved to take place. That event, and the combined operation of other causes, which it is not the object of this sketch to detail, terminated in the restoration of Charles II. to his throne, and in the restoration of the Scottish people to their national independence. But amidst the general, and perhaps extravagant rejoicings to which this apparently, at the hour, auspicious event gave birth, and amidst the, perhaps unwarrantably, high expectations then entertained of the future prosperity of the nation, the Scotch Convention of the Estates and Parliament, from a strange want of foresight, *if not in a manner forced by the state of parties in England*, unfortunately omitted entirely to make any adequate provision against the recurrence of that abuse of royal authority, in which the civil wars originated, and which had produced so much misery. The accession of the family of Stewart to the English throne, while it in a great measure, though not entirely, put an end to the wars between the two nations, was in many respects an unfortunate event for the Scottish people. The additional power thereby acquired by him, enabled the King not merely to curb the turbulent nobles, but to reduce too much the due and salutary influence of the landed aristocracy of Scotland, and to render many of them, from ambition or poverty, comparatively servile attendants at a foreign court. What was perhaps still worse, it rendered it less necessary for the Crown to cultivate the good will of the Third Estate, which represented the interests of the great body of the nation, and tended to make the monarch, if not regardless, at least more indifferent, to the welfare and wishes of the middle and lower classes of his subjects.

In this brief sketch of the progress of the Law of Scotland, it is fortunately not necessary to enter into any detail of the enormities, which disgraced the government of Scotland, from 1660 to 1689, during the reigns of Charles II. and James VII. of Scotland. From his residence in London or its vicinity, Charles was led, or in a manner obliged, to govern his smaller kingdom by a delegated authority, a commissioner to represent royalty, and the old ordinary ministers of State and Privy council. And devoted to pleasure and amusement, and taking no serious

interest in the welfare of the Scottish people, he recklessly delegated the government to a succession of ministers who, with very few exceptions, such as the Earl of Tweeddale and Sir Robert Murray, were unprincipled, avaricious, and tyrannical rulers, such as Middleton, Rothes, Sharpe, and Lauderdale.

These ministers, soon after the accession of Charles, unfortunately, in that respect, supported by the intolerant zeal and religious prejudices of the Lord Chancellor Clarendon, managed matters so, as again to introduce Prelacy, contrary to the wishes of the people; and not only actually enforced the ejection of the Presbyterian clergy, but also continued, throughout this reign, to enforce by severe penalties the adoption of the Episcopal form of worship, contrary to the convictions and feelings of a large portion of the nation, and the abandonment of Presbyterianism, although the latter had previously been deliberately and solemnly established by Parliament as the national religion.

In this way these ministers of the Crown oppressed the middle and lower classes of the community, by the rigorous exaction of pecuniary penalties from the Non-Conformists, partly to please their sovereign, but chiefly for their own emolument. And they oppressed such of the nobles and landed Gentry as ventured to oppose them, by perverting the Criminal law of the land, and procuring unjust sentences of attainder and forfeiture, so as at once to get quit of their opponents, and obtain grants of their forfeited estates. While England suffered much less comparatively, Scotland was thus, during the reign of Charles, reduced to a situation little better than that of a subjugated province. And impartial posterity admit the cruel enormities committed during the two reigns of Charles II. and James, fully warranted the resistance of the nation, and justified the Convention of States in their declaration in 1689, that the male branch of the House of Stewart had forfeited their right to the crown of Scotland.

During these times we might have hoped that the firmness of the judges and lawyers would have so far stemmed the torrent of tyrannical abuse; and we have to record the energy with which President Sir John Gilmour, of Craigmiller, at

the commencement of the reign of Charles II., defended the patriotic Earl of Argyle against the unquestionably unjust and groundless accusation of accession to the death of the king. We have also to record the manly opposition which, during the oppressive administration of the unprincipled Duke of Lauderdale, a number of the faculty of advocates made against the attempted abolition of the right of appeal to Parliament, for which opposition they were banished for a term from their practice in the metropolis. But it is melancholy to observe that, while the king's ministers availed themselves of their power to crowd the courts of Justiciary and session with their creatures, ignorant or unprincipled judges, the more eminent judges and lawyers did not do their duty; as when, in 1667, the Court of Session gave the illegal opinion, that the Court of Justiciary might proceed in absence to the trial and condemnation of such alleged contumacious traitors, as refused to appear. It is painful to observe that Sir George Mackenzie, to whom the law of Scotland is under very considerable obligations, should, as the obsequious Lord Advocate of Charles II., have supported doctrines so despotic and arbitrary.

And it is lamentable to think that even President Sir James Dalrymple, afterwards Viscount Stair, the master-mind to whom the Law of Scotland is to such a great extent and in so high a degree indebted, should, it is believed from the virulence of political party spirit, or personal malice, have been exposed to the accusation of having acquiesced in, or in any way given his support to the oppressive tyrannical conduct of the king's commissioner, Lauderdale, or lent his aid in managing the Court of Session.

The only apology for such temporising conduct would have been, that if he had strongly opposed Lauderdale, he would in all probability have been unjustly accused, illegally condemned, and incurred the forfeiture, if not of his life, at least of his estate. And it ought to be remembered that independently of the vast services he rendered to the law, Viscount Stair, all along a staunch Presbyterian, was mainly instrumental in obtaining the election of the Presbyterians to the Convention of the Estates in 1689,

which put an end to the arbitrary power of the Stuarts, and was the supporter and friend of the Prince of Orange.[1]

But while the ministers of Charles II. and James VII. thus perverted the Public Criminal Law of Scotland, for the accomplishment of their tyrannical, oppressive, and avaricious purposes, they had not the same inducements to pervert the administration of the Ordinary Municipal Law or Private Jurisprudence of the country,—at least not farther than the object of obtaining for the time favourable judgments for their friends, and adverse judgments for their enemies. Bnt whether from this or other causes, the Municipal Law or Private Jurisprudence of Scotland, from 1660 to 1700, made as great progress, if not greater, than might have been expected, from the people having been so harassed by the Government. During this period we have the decisions of the Supreme Court in matters of private civil right, ably reported by President Sir John Gilmour, of Craigmiller, from 1661 to 1666; by Sir John Baird, of Newbyth, from 1664 to 1667; by Sir John Nisbet, of Dirleton, from 1665 to 1667; by Sir Peter Wedderburn, of Gosford, from 1668 to 1677; by Sir James Dalrymple, Viscount Stair, from 1661 to 1681; by President Falconer, of Newton, from 1681 to 1685; by Sir Roger Hog, of Harcare, from 1681 to 1691; by Sir John Lauder, of Fountainhall, from 1678 to 1712. These were all comparatively able men, who are proved by their reports of the decisions of the Supreme Civil Court to have made a study of the private jurisprudence of their country. And there can be no doubt they improved the Common Consuetudinary Law of Scotland by the exercise of their talents in the decision of the cases which emerged, and in the adoption of the equitable principles of the Roman law, in cases where they were applicable.

Besides his work on Criminal Law and Observations on the Statutes, Sir George Mackenzie's Practical Systematic Treatise on the Civil Department of the Law was likewise very useful, although by no means equal to the previous more scientific treatise of Viscount Stair. And, doubtless, that work, entitled the "Institutions of the Law of Scotland,"

[1] Some further particulars of the life of this truly great lawyer may be given in a future Number.

of which the first edition was published in 1681, and the second in 1693, was an invaluable present to the people of Scotland, both in a scientific and practical point of view. It shows that, while he was quite aware of the excellence of the Roman law, and disposed to adopt its principles where applicable, he thought for himself, and did not seriously adopt either the arrangements or the views of the Roman lawyers, unless he was convinced they were founded in justice and legal principle. His acuteness and the extent of his views appear from the distinctions he marks, among Obligations, as arising not merely from the connections of family and kindred, from mutual contracts or engagements, or from unilateral acts, legal, or illegal and injurious; but also from the combinations of circumstances and events, which exist or occur in the life of individuals, or in the progress of civil society, independently of any will or act on the part of the individual or legislation of the nation.

But not only did the eminent lawyers to whom we have just alluded, improve the Common Consuetudinary Law of Scotland by their studies, their judgments, and reports, and their systematic treatises; they appear also, particularly Viscount Stair, to have suggested many useful statutes to the legislature, where its intervention was necessary.

The addition made in 1672, of five Lords of Session to the Court of Justiciary, instead of the occasional deputies, whom the Justice General was in use to name, does not appear to have been of any avail in curbing or checking the tyrannical disposition of the then existing Government; but it certainly improved the constitution of that court; which, with its ancient jury and public prosecutor and counsel for the accused, has in the ordinary administration of criminal justice, apart from state offences, maintained its respectability for more than a century and a half.

By act 1661, c. 25., the creditors of a deceased debtor were protected for a year against the deeds of alienation of an apparent heir; and by the act 1695, c. 41., they were enabled to constitute their claim, and obtain payment from the moveable estate of the deceased.

By act 1672, c. 19., substituting for Apprisings, Decrees of adjudication and judicial sales, the process in execu-

tion by creditors against the lands and heritages of their debtors, was greatly simplified, and put on a proper footing.

By the act 1669, c. 3., the register of land rights was improved, and purchasers and creditors rendered still more secure, by requiring instruments of resignation ad remanentiam by vassals, to be recorded, as well as sasines, within sixty days. The register of land rights was still farther improved by its more effectual extension to tenements held in burgage tenure by the statute 1681, c. 11., which enacts, that all instruments of seisin, reversions, and other rights, absolute or conditional, affecting tenements held in burgage, shall be inserted in the town clerk's books, within sixty days after the date of the same, under the certification that, otherwise, these deeds shall make no faith in judgment; by way of action or exception, in prejudice of a third party, who has acquired a perfect and lawful right to such tenement; reserving their effect against the grantors, their heirs and assignees.

By act 1672, c. 16., it was directed, that the keeper of the general registers of hornings and inhibitions, and of sasins and reversions, and also the keepers of these registers in the several shires, be careful, in time coming, to book all hornings, inhibitions, sasins, and reversions, and others recorded by them; and that they make exact minute books relating to these registers, containing the names and designations of the parties; and by act 1685, c. 38., and act 1693, c. 14., still farther regulations were made for the improvement of the Records, the preservation of the writs recorded, and the facilitating of search by the keeping of minute books, and the recording of the writs in the order of the minute book.

By act 1669, the Quinquennial prescription of arrestments, or attachments of funds or effects for debts, of the rents of lands, ministers' stipends and multures, and of bargains of moveables; and also the Vicennial prescription of holograph writs, were established.

By act 1695, c. 5., the Septennial limitation of cautionary obligations, or suretyship, was introduced. A salutary measure, as the ruin and distress of many families had arisen from such engagements, entered into from friendly feelings, injudiciously or carelessly.

By the act 1621, provision had been made against deeds of

alienation granted by insolvent debtors to relations or conjunct, and confident persons, by declaring them reducible at the instance of prior creditors; and by the act 1695, c. 6., a still farther improvement was made by establishing what was to constitute the character of bankruptcy, and by declaring all deeds of alienation in satisfaction of prior debts reducible, if granted within sixty days of the bankruptcy.

By act 1681, c. 2., a privilege or indulgence was granted to foreign bills of exchange, or mercantile documents, by allowing them, if duly protested, to be recorded in the books of competent courts, *pro formâ* decrees to pass thereon, and execution to take place, in security or absolute, against the persons or estate of the debtors; and by act 1694, c. 36., the same execution was declared competent on inland bills.

By act 1686, c. 5., the act of 1579, c. 80. was improved, and the requisites fixed, by the observance of which a Deed or written document was declared *probatim per se*, or to afford legal evidence of itself, without being proved by witnesses.

From the long experience and superior talents of Viscount Stair, as proved by his Reports of Decisions from 1661 to 1681, and his Institutions of the Law of Scotland, published in 1681, it is highly probable many of the statutory improvements in the Law were suggested and carried by him; and it is certain that between 1681 and 1693, when he published the second edition of his Institutions, the nation is indebted to him for several useful statutes: for act 1693, c. 35., declaring that in heritable rights, procuratories of resignation, and precepts of sasine, should be effectual, though the disponer or purchaser were dead before resignation were made or infeftment taken,; for the act 1693, c. 13., by which public and base infeftments are placed on the same footing in point of validity; and for the act 1693, c. 14., prescribing and enforcing the duties of the presenters of writs for registration, and particularly of the keepers of the public registers and minute books.

Sir John Lauder, Lord Fountainhall, who reported the decisions of the Court of Session from 1678 to 1712, and along with them many interesting anecdotes of the events of

that period, was also a judge of great experience and ability; and appears to have suggested several improvements in the Law.

From the preceding narrative it appears that, whether from the reduction in the number of administrative offices, occasioned by the removal, to a certain extent, to London of the central government, in consequence of the union of the crowns, or from other pre-existing causes, the practice of the Law in its higher departments continued to be an object of ambition, and to have such attractions as to lead to its adoption, as a profession or business, by the younger sons of the landed gentry, and generally by the sons of that portion of the community who possessed the means of giving their children an early education, which, though obtained at a moderately cheap rate, was solid and substantial, and sufficiently liberal.

From the preceding references to various statutes, it also appears that during the seventeenth century the Common Law of Scotland derived a great advantage from the facility afforded to eminent lawyers, senators of the College of Justice, and others, of getting introduced and carried through Parliament various bills, or drafts of regulations, for supplying its defects, and extending its beneficial provisions and rules, — a facility which, though neither withdrawn nor positively withheld, was certainly not much enjoyed by the Scottish people during the eighteenth century, or at least, not till near the close of it.

And it may be here noticed, that the distinction which has come to be established in England between Law and Equity as two separate systems, and the allotment of these systems to separate and independent Courts, was not recognised in Scotland during the seventeenth century. In that kingdom, as in the judicial practice of the continental states, Law and Equity continued to be decided in each case as it emerged, and by one and the same Supreme Court; Equity being chiefly considered as the gradual advancement, or development, of the Common Consuetudinary Law, the approximation gradually made to the rules of justice and general expediency.

The interval which elapsed between the revolution of 1689 and the legislative union of the kingdoms, at which we have now arrived, was comparatively a period of tranquillity and comfort for Scotland, though not of much national prosperity. During the reigns of William and Mary, and of William, persecution for nonconformity in religious opinion and worship, the exaction of pecuniary penalties for nonconformity from avarice, and unjust trials for treason, with a view to the consequent attainders and forfeitures, entirely ceased. The great body of the people were allowed the form of religious worship which they preferred, and Presbyterianism was again and finally declared the established religion of the kingdom. And although too much occupied in laudably maintaining the general independence of the European nations to attend much to his kingdom of Scotland, as he otherwise in all probability would have done, William's reign, with the exception of the stain of the massacre of Glenco, was comparatively a merciful and mild one. The well-known Darien expedition showed that when they obtained a tolerably good government and were left to the free exertion of their native energies, the people of Scotland were, as in former ages, disposed, and were becoming able for extensive mercantile adventure. And the illiberal opposition to this enterprise by the English mercantile community, proved that the union of the crowns, although it might have put an end to open, external wars, between the two nations, had not extinguished that jealousy and dislike of rivalship which the separation of mankind into independent states has, no doubt, a tendency to engender, along with many patriotic virtues; and that a closer and more intimate union, the habitual intercourse of individuals, and the gradual amalgamation, as it may be called, of the people, or middle classes of the community, are requisite, to excite that fairness and liberality of sentiment in commercial affairs which, it is hoped, now subsist between the inhabitants of the southern and northern parts of this island.

ART. V. — THE NEW PILGRIM'S PROGRESS.

CHAPTER V.[1]

I SAW in my dream, that after Pilgrim had restored Madam Equity to her subjects, that he proceeded on his way; nor had he journeyed long before he was met by Hopeful, who was ever hanging on his steps.

The meeting was a joyful one; for, besides the pleasure that these two good men had in seeing one another, each had much to communicate to the other.

After conquering the monster FEUDALITY, I had seen that they had parted, Hopeful to seek out the Lady Common Law, and to carry her the trophy of the victory; Pilgrim to discover the abode of Madam Equity, and to deliver her, if possible, from duress. It was indeed then a joyful moment when these two met, and thus did they converse together.

Pilgrim. — "Before telling you what I have done, dear Hopeful, let me know how you have sped? Did you find your way back to the Lady Common Law?"

Hopeful. — "I did, and proclaimed the joyful tidings that the monster Feudality had been dreadfully wounded and driven from the land, and I produced that tail of many joints which you had severed, as evidence of the truth of my story. The lady herself rejoiced much that she was now freed from all the effects of his tyranny, under which she said she had too long suffered; still he had his votaries, who clung to the remembrance of his rule, and would have not only retained it, but have invited him back again, maimed and useless as he is, having lost all his original strength and beauty."

[1] For the preceding Chapters, see 5 L. R. and 6 L. R.; Chap. IV. 7 L. R. 346.

Pilgrim. — "Ah! that is ever so: but now his power is gone, has any good been done? Do people still act in the land of Common Law as if in fear of him? Do they use him for their spells and conjurations? Has he still his priests with their mysteries? This FEUDALITY has long since been worse than useless, and yet his poisonous breath has been breathed over this land, and no one could part with a rood of it without his permission. So he set up his priests every where, to keep people from their just rights, and no one could plead in the Courts without putting on his chains."

Hopeful. — "Here, however, his power is departing. Day by day they throw down his lifeless image in Court after Court. He was ever afraid of the light, and that is coming in. Still, by some singular chance, although he is now as good as dead, he has still his worshippers, and that especially among the better class. The poor are becoming emancipated, but the rich must still submit to him, and thus they pass out of his hands and become poor. There should be but one broad road to the Temple of Justice, kept by the Lady Common Law, and that should be found easily. But FEUDALITY taught his votaries that there should be nine or ten narrow roads, and thus it is that those who sought the Temple of Justice were constantly misled, not knowing which to choose.

"But tell me, Pilgrim, your adventures. Did you discover the distressed sister of this Lady Common Law, Madam Equity?"

Pilgrim. — "Yes, in custody of a bloated creature named COSTS, who held her under lock and key, and deprived her subjects even of the very sight of her. But I set her at liberty by reducing her keeper to more reasonable dimensions. And now let me tell you what I propose to do, and I invite your co-operation. These sisters, as you know, are separated, and never see each other's face. Common Law won't acknowledge Equity, and Equity sneers at Common Law. They govern their subjects after a different fashion, and they are frequently at cross purposes. Now this would not be of so much consequence, if their differences did not

greatly distress and vex the pilgrims to the Temple of Justice. There are now two such Temples; the one is in possession of Lady Common Law, and the other in that of Madam Equity, and sometimes it is difficult to know which to choose. Now, if the two sisters could agree to make one great Temple, with one safe and certain road ——"

Hopeful. — "Tell me, dear Pilgrim, a little of the history of these ladies."

Pilgrim. — "Listen then. Their father was the same, but they had different mothers. They are the daughters of Justice: the elder was called Common Law, and her mother was Custom; the younger was named Equity, and she springs from the connection of her father with the nymph Roma. These two were the legitimate offspring of Justice, but history confesses that he had also several concubines of inferior race, who have all borne children. Of these Chicanery was too often associated with Common Law, and Expense and Delay have been almost inseparable from Equity. Justice was sore put to it to support all this brood, and indeed sometimes they pressed him so sore that he fell into a languishing condition, and was obliged to apply to one Dr. Reform, without whose timely and repeated aid, he would in fact have given up the ghost, and been smothered outright.

"This Justice was, however, odd in his habits; now here, and now there, and difficult in many cases to be found at all. Sometimes he dwelt with Law; then he paid a visit to Equity, but no one could tell beforehand where he might be at the precise moment he was wanted. If a suitor knocked at Common Law's door, he was often told to go to Equity to find him, and if he followed, then the suitor was sent back to Common Law. In fact, at times, no one knew where to find Justice.

"For many years the two sisters have lived separate. They have each, as you know, a spacious mansion, numerous stately officers and a crowd of clients and retainers. They are kept separate by their flatterers, who extol their respective merits, and look not to the ends for which they were

begotten by Justice, but to their own particular aggrandisement. Now I have seen both these ladies, and admire them both. There is much in both of them to commend. Let us no longer have them parted. Let the sisters be once more united, and thus shall we and all other pilgrims to the Temple of Justice profit by this union."

Hopeful. — "An admirable plan. Let us devote our lives to this great task, and endeavour to accomplish it."

Now this Union, so proposed, was found easy. The sisters sprung from one father, had much in common, nor was it difficult to smooth down those points of difference which presented themselves. Common Law was no longer trammeled by forms and ceremonies, and Equity relieved from the dominion of the monster COSTS, went on together hand in hand, their only care being to render smooth and easy the broad road to the palace of their father, the Temple of Justice.

Then Pilgrim went on his way with Hopeful, but they were in peril, for their way was through VANITY FAIR.

ART. VI.—THE LEGISLATION OF 1850.

Public General Acts, 13 & 14 *Victoria.*

IN a previous Number of this Review[1] we presented to our readers a sketch of the labours of the Legislature during the Session then just terminated, classified in such a manner as might afford some insight into the subjects with which they had mainly been occupied, accompanying our classification by a few remarks upon such of the new statutes as seemed to us the most deserving of attention by the legal public. Time has now carried us through another legislative epoch, and, indeed, to the beginning of a second, and again we would invite those who take an interest in watching the progress of legislation, to cast a look back upon the legislative labours of

[1] 11 L. R. 55.

the year which has just expired, that they may form a clearer conception of our present position, before embarking afresh amidst the whirl of measures, with which each new Session of Parliament is certain to be surrounded, and out of which the fresh offspring of legislative genius must arise.

We shall follow on the present occasion the same general arrangement of subjects which we adopted on the former occasion; both in order to facilitate comparison, and because we do not know that we could suggest any one materially better, and shall therefore arrange the one hundred and sixteen acts of the last Session under one or other of the several heads following:—

I. Laws relating to the Crown and Legislative body, its constitution, mode of procedure, and machinery.

II. Laws relating to the internal government of the country, the general and local administration, the revenue, and the public security, including under the latter head those relating to the military and naval force, the police, and the punishment of crime.

III. Laws relating to the external government, that is to say, either our own colonies, or foreign states.

IV. Laws relating to the administration of justice, as concerning either the constitution of the courts and modes of proceeding, the civil or criminal law, equity, bankruptcy and insolvency, or the ecclesiastical law.

V. Laws relating to ecclesiastical matters, such as the division of parishes, the endowment of churches, &c.

VI. Laws relating to the public health, safety, or morals.

VII. Laws relating to the promotion of education, art, or science.

VIII. Laws relating to trade, commerce, and internal communication.

IX. Laws relating to improvements and public works.

X. Laws relating to charitable institutions.

XI. Laws relating to the management or maintenance of the poor.

XII. Laws relating to the property of individuals.

XIII. Laws relating exclusively to local objects.

We shall retain also the plan of classifying the acts re-

lating to any one of the provinces of the empire or of its dependencies exclusively, under one general head formed by reference to the part of the empire to which they relate; uniting under the same general head all those which concern more than one of those divisions. Following these principles, we lay before our readers a synopsis of the results of the last Session of Parliament.

SYNOPSIS OF THE ACTS OF THE 12 & 13 VICTORIA.

LAWS AFFECTING MORE THAN ONE OF THE PROVINCES OR DEPENDENCIES OF THE EMPIRE.

I. *Laws relating to the Crown and Royal Family, or the Houses of Parliament.*

Royal Family:

c. 77. An Act to enable Her Majesty to make a Suitable Provision for His Royal Highness the Duke of Cambridge, and also for her Royal Highness the Princess Mary of Cambridge.

c. 78. An Act to enable Her Majesty to make Provision for the Residence of his Royal Highness Albert Edward, Prince of Wales, in Marlborough House, during the Joint Lives of Her Majesty and his.

Parliament:

c. 21. An Act for Shortening the Language used in Acts of.

II. *Laws relating to the Internal Government of the Empire.*

General Administration:

c. 12. An Act to indemnify such Persons as have neglected to qualify themselves for Offices and Employments, and to extend the Time limited for those Purposes respectively.

c. 33. An Act for taking Account of the Population of Great Britain.

Local Administration:

c. 42. An Act to confirm the Incorporation of certain Boroughs, and to provide for the Payment of the Expenses of Incorporating new Boroughs.

Revenue:

c. 3. 10. 22. 107. Acts providing for the Service of the Year.

c. 9. An Act to repeal the Duties and Drawbacks of Excise on Bricks.

c. 40. An Act to regulate the Disposition of the Naval Prize Balance.

c. 67. An Act to reduce the Duty of Excise on Sugar manufactured in the United Kingdom, and to impose a countervailing Duty on Sugar used in the Brewing of Beer for sale; and also to amend the Laws relating to Brewers and Distillers.

c. 95. An Act to amend the Laws relating to the Customs.

c. 96. An Act to continue and amend the Acts for authorizing a Composition for Assessed Taxes.

c. 97. An Act to repeal certain Stamp Duties and to grant others in lieu thereof, and to amend the Laws relating to the Stamp Duties.

Public Security:

c. 5. An Act for punishing Mutiny and Desertion, and the better Payment of the Army and their Quarters.

c. 7. An Act for the Regulation of Her Majesty's Royal Marine Forces while on Shore.

c. 62. An Act to alter and extend the Act passed in the Eleventh Year of King George IV. for Amending and Consolidating the Laws relative to the Pay of the Royal Navy.

c. 46. An Act to suspend the Making of Lists, and the Ballot and Enrolment for the Militia of the United Kingdom.

c. 49. An Act to defray the Expenses of the Disembodied Militia in Great Britain and Ireland, and grant Allowances to certain Officers of the Militia and authorize the Employment of the non-commissioned Officers.

c. 20. An Act to amend an Act of the Fifth and Sixth Years of her present Majesty for the Appointment and Payment of Special Constables.

c. 87. An Act for the Payment of a Moiety of certain Penalties towards Police Superannuation Funds.

c. 39. An Act for the Better Government of Convict Prisons.

III. *Laws relating to the External Government of the Empire.*

Colonies:

c. 15. An Act to authorize the Establishment of Courts of Appeal for certain of Her Majesty's West India Colonies.

c. 59. An Act for the Better Government of Her Majesty's Australian Colonies.

IV. *Laws relating to the Administration of Justice.*

Criminal Law:

c. 37. An Act for the further Extension of Summary Jurisdiction in Cases of Larceny.

V. *Laws relating to Ecclesiastical Matters.*

c. 28. An Act to render more simple and effectual the Titles by which Congregations or Societies for Purposes of Religious Worship or Education in England and Ireland hold Property for such Purposes.

c. 57. An Act to prevent the Holding of Vestry, or other Meetings in Churches, and for regulating the Appointment of Vestry Clerks.

c. 98. An Act to amend the Law relating to the Holding of Benefices in Plurality.

VI. *Laws relating to the Public Health, Safety, or Morals.*

Health:

c. 32. 90. 108. Acts for confirming Provisional Orders of the Board of Health.

c. 71. An Act to continue an Act of the 11 & 12 of her present Majesty, for Preventing the Spreading of Contagious or Infectious Disorders among Sheep, Cattle, and other Animals.

Safety:

c. 100. An Act for the Inspection of Coal Mines in Great Britain.

Morals:

c. 23. An Act to repeal an Exception in an Act of the twenty-seventh Year of King Henry VI., concerning the Days whereon Fairs or Markets ought not to be kept.

VII. *Laws relating to the Promotion of Education, Art, or Science.*

c. 65. An Act to enable Town Councils to establish Public Libraries and Museums.

c. 104. An Act to extend and amend the Laws relating to the Copyright of Designs.

VIII. *Laws relating to Trade, Commerce, and Internal Communication.*

Trade and Commerce:

c. 26. An Act to repeal an Act of the Sixth Year of King George IV., for Encouraging the Capture or Destruction of Piratical Ships and Vessels, and to make other Provisions in lieu thereof.

c. 27. An Act to provide for the Commencement of the last Act.

c. 54. An Act to amend the Acts relating to Labour in Factories.

c. 56. An Act to continue the Act for Exempting certain Bills of Exchange and Promissory Notes from the Operation of the Usury Laws.

c. 80. An Act to repeal Part of an Act of the Fifteenth Year of King George III., for the Encouragement of the Fisheries carried on from Great Britain, Ireland, and the British Dominions in Europe, and for securing the Return of the Fishermen, Sailors, and others employed in the said Fisheries to the Ports thereof at the End of the Fishing Season.

c. 93. An Act for improving the Condition of Masters, Mates, and Seamen, and maintaining Discipline in the Merchant Service.

Internal Communication:

c. 58. An Act to continue an Act for authorizing the Application of Highway Rates to Turnpike Roads.

c. 79. An Act to continue certain Turnpike Acts in Great Britain, and to make further Provision respecting Turnpike Roads in England.

c. 83. An Act to facilitate the Abandonment of Railways and the Dissolution of Railway Companies in certain Cases.

c. xxxiii. An Act for regulating Legal Proceedings by or against the Committee of Railway Companies associated under the Railway Clearing System.

IX. *Laws relating to Improvements and Public Works.*

c. 31. An Act to authorize further Advances of Money for Drainage and the Improvement of Landed Property in the United Kingdom, and to amend the Laws relating to such Advances.

c. 64. An Act to provide for more effectually Maintaining, Repairing, Improving, and Rebuilding Bridges in Cities and Boroughs.

X. *Laws relating to Charitable Institutions.*

c. 45. An Act to continue the Act to amend the Laws relating to Loan Societies.

c. 115. An Act to consolidate and amend the Laws relating to Friendly Societies.

XI. *Laws relating to the Maintenance or Management of the Poor.*

c. 50. An Act to continue the Exemption of Inhabitants from Liability to be rated in respect of Stock in Trade, or other Property, to the Relief of the Poor.

XII. *Laws relating to Property.*

c. 17. An Act to amend an Act of last Session for granting Relief against defects in Leases under Powers of Leasing.

c. 60. An Act to consolidate and amend the Laws relating to the Conveyance of Real and Personal Property vested in Mortgagees and Trustees.

LAWS RELATING TO ENGLAND AND WALES ONLY.

II. *Laws relating to the Internal Government of the Country.*

Local Administration:

c. 99. An Act for the better Assessing and Collecting the Poor Rates and Highway Rates in respect of Small Tenements.

c. 105. An Act for the Union of Liberties with the Counties in which they are situated.

IV. *Laws relating to the Administration of Justice.*

Courts of Common Law:

c. 16. An Act to enable the Judges of the Courts of Common Law at Westminster to alter the Forms of Pleading.

c. 25. An Act to enable Queen's Counsel, and others not being of the Degree of the Coif to act as Judges of Assize.

c. 75. An Act to regulate the Receipt and Amount of Fees receivable by certain Officers of the Court of Common Pleas.

Court of Chancery:

c. 35. An Act to diminish the Delay and Expense of Proceedings in the High Court of Chancery in England.

c. 43. An Act to amend the Practice and Proceedings of the Court of Chancery of the County Palatine of Lancaster.

County Courts:

c. 61. An Act to extend the Act for the more easy Recovery of Small Debts and Demands in England, and to amend the same.

Justices of the Peace:

c. 91. An Act to authorize Justices of any Borough having a

separate Gaol to commit Assize Prisoners to such Gaol, and to extend the Jurisdiction of Borough Justices to all Offences and Matters arising within the Borough for which they act.

V. *Laws relating to Ecclesiastical Matters.*

c. 47. An Act for further continuing certain temporary Provisions concerning Ecclesiastical Jurisdiction in England.

c. 94. An Act to amend the Acts relating to the Ecclesiastical Commissioners for England.

VII. *Laws relating to the Promotion of Education, Art, or Science.*

Education:

c. 11. An Act to make better Provision for the Contributions of Unions and Parishes in School Districts to the Common Funds of their respective Districts.

IX. *Laws relating to Improvements and Public Works.*

cc. 8. 66. Acts to authorize the Inclosure of Lands in pursuance of Reports of the Inclosure Commissioners for England and Wales.

XI. *Laws relating to the Maintenance or Management of the Poor.*

c. 101. An Act to continue two Acts passed in the 12th & 13th years of the Reign of Her Majesty, for charging the Maintenance of certain poor Persons in Unions in England and Wales upon the Common Fund; and to make certain Amendments in the Laws for the Relief of the Poor.

XIII. *Laws relating exclusively to Local Objects.*

St. Burian, Cornwall, c. 76. An Act to provide for the Division of the Deanery of, and for abolishing the Royal Peculiar of.

Greenwich, c. 24. An Act for Improving the Hospital, and certain other Parts of the Town.

Holyhead, c. 111. An Act to relieve the Chester and Holyhead Railway Company from contributing to Expenses of the New Harbour.

Isle of Portland, c. 116. An Act to amend the Act for making a Harbour of Refuge there.

Manchester, c. 41. An Act for Division of the Parish of Manchester, and the Application of the Revenues of the Collegiate

and Parish Church. c. 84. An Act as to Customs on Goods warehoused in the Borough.

Metropolis, c. 7. An Act for Consolidating the Office of Registrar of public Carriages with that of Commissioner of Police. c. 52. An Act to make better Provision for the Interment of the Dead in and near the Metropolis. cc. 103. 109. Acts relating to certain Improvements in.

Upton Cum Chalvey, c. 38. An Act to render valid certain Marriages in the New Church at.

Westmoreland, c. 30. An Act to provide for the Appointment of the Sheriff.

LAWS RELATING EXCLUSIVELY TO IRELAND.

I. *Laws relating to the Crown and Legislative Body.*

Legislature:

c. 68. An Act to Shorten the Duration of Elections in Ireland, and for Establishing additional Places for taking the Poll thereat.

c. 69. An Act to amend the Laws which regulate the Qualification and Registration of Parliamentary Voters in Ireland, and to alter the Law for rating immediate Lessors of Premises to the Poor Rate in certain Boroughs.

II. *Laws relating to the Internal Government.*

General Administration:

c. 44. An Act for taking Account of the Population of Ireland.

Local Administration:

c. 1. An Act to amend an Act of last Session for making Provision for the Collection of the County Cess in Ireland, and the Remuneration of the Collectors thereof.

c. 82. An Act to extend the Remedies for the Collection of Grand Jury Cess.

c. 4. An Act for requiring the Transmission of Annual Abstracts of Accounts and Statements of Trustees or Commissioners of Turnpike Roads and Bridges in Ireland to the Lord Lieutenant to be laid before Parliament.

Revenue:

c. 114. An Act to Repeal the Stamp Duties on Proceedings in Courts of Law in Ireland and grant certain other Duties in lieu thereof.

Public Security:

c. 2. An Act to restrain Party Processions in Ireland.

c. 106. An Act to continue for a Time to be limited an Act of the 11th Year of Her present Majesty for the Prevention of Crime and Outrage in certain Parts of Ireland.

IV. *Laws relating to the Administration of Justice.*

Courts of Common Law:

c. 18. An Act for the Regulation of Process and Practice in the Superior Courts of Common Law in Ireland.

c. 19. An Act to explain and amend the last Act.

c. 51. An Act for the Transfer of the Equitable Jurisdiction of the Court of Exchequer to the Court of Chancery in Ireland.

c. 73. An Act to amend the Law relating to Proceedings by Process of Attachment of Goods in Escheat in the Borough and other Courts of Record.

c. 74. An Act for the better Regulation of the Office of Registrar of Judgments in Ireland.

c. 85. An Act to provide for holding the Assizes of certain Counties of Cities and Towns in Ireland, in the Assize Towns of the adjoining Counties in certain cases; and to make Provision as to Gaols in case of the change of Assize Towns.

Court of Chancery:

c. 89. An Act to regulate the Proceedings in the High Court of Chancery in Ireland.

Justices of the Peace:

c. 102. An Act to consolidate and amend the Acts relating to certain Offences and other Matters to which Justices of the Peace exercise a summary Jurisdiction in Ireland.

VIII. *Laws relating to Trade, Commerce, and Internal Communication.*

Trade and Commerce:

c. 48. An Act to continue certain Acts relating to Linen, Hempen, and other Manufactures in Ireland.

c. 88. An Act to amend the Laws relating to Engines used in Rivers and on the Sea Coasts for the taking of Fish in Ireland.

Internal Communication:

c. 34. An Act to continue certain Acts for regulating Turnpike Roads in Ireland.

IX. *Laws relating to Improvements and Public Works.*

c. 113. An Act to authorize the Transfer of Loans, for the Improvement of Land to other Land in Ireland.

X. *Laws relating to Charitable Institutions.*

c. 110. An Act to continue the Act for amending the Laws relating to Savings' Banks in Ireland.

XI. *Laws relating to the Maintenance or Management of the Poor.*

c. 14. An Act to authorize a further advance of Money to certain Distressed Poor Law Unions, and to make Provision for the Repayment of Advances made and authorized to be made to Poor Law Unions and other Districts in Ireland.

XII. *Laws relating to Property.*

c. 29. An Act to amend the Laws concerning Judgments in Ireland.

c. 72. An Act to amend the Laws for the Registration of Assurances of Lands in Ireland.

XIII. *Laws relating exclusively to Local Objects.*

Dublin, c. 55. An Act to amend an Act of the last Session for amending an Act for the Regulation of Municipal Corporations in Ireland, so far as relates to the Borough of Dublin.

c. 81. An Act to explain the said Act, so far as relates to Dublin.

Lough Corrib, c. 112. An Act relating to the Works of the Lough Corrib Improvement Company.

LAWS RELATING EXCLUSIVELY TO SCOTLAND.

II. *Laws relating to the Internal Government.*

General Administration:

c. 63. An Act to provide for the Redemption of an Annuity of 10,000*l.*, payable to the Equivalent Company.

Public Security:

c. 33. An Act to make more effectual Provision for Regulating the Police of Towns and populous Places in Scotland.

IV. *Laws relating to the Administration of Justice.*

Court of Sessions:

c. 36. An Act to facilitate Procedure in the Court of Session in Scotland.

V. *Laws relating to Ecclesiastical Matters.*

c. 13. An Act to render more simple and effectual the Titles by which Congregations or Societies associated for the purpose of Religious Worship or Education in Scotland hold Real Property for that Purpose.

VI. *Laws relating to the Public Health, Safety, or Morals.*

Health:

c. 33. An Act to make more effectual Provision for Paving, Draining, Cleaning, and Lighting Towns and populous Places in Scotland. See II., *suprà*.

Morals:

c. 92. An Act for the more effectual Prevention of Cruelty to Animals in Scotland.

IX. *Laws relating to Improvements and Public Works.*

c. 33. An Act to make more effectual Provision for Improving Towns and populous Places in Scotland. See II. & VI. *suprà*.

XIII. *Laws relating exclusively to Local Objects.*

Edinburgh, c. 86. An Act for erecting a National Gallery.

LAWS RELATING EXCLUSIVELY TO SOME COLONY.

New Zealand, c. 70. An Act empowering the Canterbury Association to dispose of certain Lands in New Zealand.

Such is the general outline of the additions which the last year has made to our Statute Law. Its results may be shortly summed up as follows:—after deducting from the 116 acts enumerated in the statute, thirty-three, which are either acts to continue former acts, or, like the Inclosure Acts, to confirm the decisions of Commissioners acting under the general authority given them by former acts, (three of which are busied with setting right mere errors of carelessness in

former acts,) and fifteen, of which the objects are local only[1], there remain seventy-six acts, which may be considered as substantial additions to our laws, of which thirty-nine relate to more than one of the great provinces of the empire or its dependencies, twelve exclusively to England, nineteen to Ireland, and five to Scotland; and of these seventy-six laws, seventeen, or more than one-fifth of the whole number, have as their subject matter the improvement of the administration of justice by changes in the machinery through which justice is to be dealt out: a proof, surely, if proof be necessary, of the imperfect nature of the machinery at present in use, and of the wide extent to which dissatisfaction with it is spread. We may add, that in these circumstances we find an imperative call upon all those who do not desire to see the course of justice interrupted by the delays, the doubts, and difficulties arising from perpetual change, to look thoroughly into the whole of the existing system, with the view of giving it such form as shall render it really adequate to fulfil the great task it has to perform, with as great an approach to perfection as can reasonably be required of human institutions, such as shall enable the inhabitants of the empire to feel that their causes are investigated and decided in the courts of law as speedily, as cheaply, and with as great an absence of needless formality as is consistent with their thorough investigation and impartial decision.

Of the great call which there is for extending the introduction of such improvements to the machinery by which our laws are produced, the Acts of the Session of Parliament now under review afford, as usual, striking instances. When we find acts of parliament with such titles as these, "An Act to provide for the Commencement of an Act of the present Session, intituled," &c.[2], resulting from the circumstance that the time fixed by the original bill for the act to come into operation was the first of June *next*, and that from the delay which took place in its passage through Parlia-

[1] The act relating to metropolitan interments, though limited in its present application to the neighbourhood of the metropolis, is treated in this classification as an act laying down general principles applicable to interments in all populous places, and therefore as of more than local interest.

[2] Chap. 37.

ment, it did not become ready for the royal assent till the first of June 1850 had expired, while, until it had become law, no one discovered the error; — when we find another act passed on the 31st of May, which is declared to take effect from the last day of Trinity term *next* after the passing thereof, and on the 10th of June a second act, declaring that "in order to prevent doubts as to the construction of the said act in that respect, these words shall be taken to mean the last day of Trinity term, 1850[1]:"—when we find the Legislature passing, in the same session, first, "An Act to amend an Act of the last Session for amending an Act for the Regulation of Municipal Corporations in Ireland," and secondly, "An Act to explain an Act of the last Session for amending an Act for the Regulation of Municipal Corporations in Ireland[2]:"— when we see this, surely we must consider it time to subject the phraseology of acts of parliament as they successively reach the stage when they are about to become law, to the revision of some competent authority, by which the danger of such errors, and the scandal of such absurdities, may be avoided in future. But leaving these general considerations, we proceed to give some more detailed account of those among the acts enumerated above, which, by their connection with legal topics, seem to us especially to merit the attention of our readers, — commencing with the acts for the improvement of the procedure of the Court of Chancery in England and Ireland. The first of these, ch. 35., for which the public is indebted to the exertions of Mr. G. Turner, has for its object the diminution of the expense and delay hitherto incident to those proceedings, first, by enabling persons interested, or claiming to be interested, in any question cognisable in the said Court as to the construction of any act of parliament, or instrument in writing, or as to the title or evidence of title of any real or personal estate contracted to be sold or otherwise dealt with, or as to the parties or form of any instrument for carrying any such contract into effect, or as to any other matter falling under the jurisdiction of the Court as a court of equity, or made

[1] See Ch. 19. [2] Ch. 55. and 81.

subject to its jurisdiction by any statute other than the statutes relating to bankrupts, to concur in stating such question in the form of a special case for the opinion of the Court (§. 1.).

In such a statement executors, administrators, or trustees are authorized to concur (§. 1.); the committee of the estates of a lunatic is empowered to act, with the authority of the Lord Chancellor, on behalf of the lunatic (§ 2.); a husband is empowered to act for his wife as well as for himself, if his interest is not opposed to hers, and a wife to act with her husband if she has not an interest adverse from his (§ 3.); and a guardian to act for an infant, with the like restriction (§ 4.); the Court being empowered, on the application of any person on behalf of any such infant or lunatic, by motion or petition, to appoint a special guardian for the purpose of concurring in the case on his behalf (§ 5.); and to remove him if expedient (§ 6.).

A special case thus submitted to the Court is to be entitled as a cause between some of the parties claiming to be interested and the others (§ 7.); it is concisely to state such facts and documents as are necessary to enable the Court to decide the question raised, the parties being at liberty at the hearing to refer to the documents themselves (§ 8.), which are to be identified by the signatures of the solicitors for all parties (§ 10.); when an infant or lunatic is a party, the case is to state how his guardian is constituted; and when a married woman claiming any interest separate from her husband is a party, it is to state her concurrence in her own right (§ 9.); it must be signed by counsel, and filed as bills are filed, and the defendants are to appear to it as they appear to bills, but without being required to take an office copy (§ 10.); all who do so appear, other than married women, infants, or lunatics, are bound by its statements on their appearance, and these latter are so bound for the purposes of the case, after leave has been given by the Court to set it down (§ 10.); a permission which is to be granted only if the Court is satisfied by affidavits or a report of the Master as to the truth of the statements made in the case, so far as they relate to the interest of these parties, and on

an application, of which notice has been given to any "party to the case in whom as executor, administrator, or trustee, any property in question therein is, or is alleged to be vested in trust for, or for the benefit of such married woman, infant, or lunatic, and also, if such application be not made on behalf of such married woman, infant, or lunatic, to such married woman and her husband, or to such infant, or to such lunatic and his committee."

The case is to be set down for hearing as soon as all the defendants to it have appeared (§ 12.). On the hearing, the Court may either "determine any question raised by the case, and by decree declare its opinion thereon, and so far as the case shall admit of the same upon the right involved therein, but without proceeding to administer any relief consequent upon such declaration; or may previously send any case or cases for the opinion of Her Majesty's Courts of Common Law; or if it "is of opinion that the questions raised thereby, or any of them, cannot properly be decided upon such case," may refuse to decide the same (§ 14.). The declaration, when pronounced, is to be "binding to the same extent as such a declaration would have been if contained in a decree made in a suit between the same parties instituted by bill (§ 14.); and is to protect all persons who make any payment or do any act in conformity with it as fully and effectually as if it had been made in such a suit (§ 15.); the declaration may be the subject of a re-hearing or appeal (§ 33.); and on the application of any party desirous of having the case re-heard, or of appealing against the declaration, the Court may defer the time at which the declaration may be so acted upon (§ 16.); lastly, the filing of the case and the entry of appearances thereon is to be taken to be a *lis pendens*, and may be registered accordingly; while until so registered, it is not to affect a purchaser or mortgagee, without express notice (§ 17.).

Such are the means which the Legislature has provided for enabling the decision of the Court to be obtained without the expense of a suit, where the facts are not in dispute, but the question between the parties turns only upon the application of some document to them. We believe that in the present state of our judicial establishments, many cases will arise in which

the new machinery proposed by the act will be productive of much advantage to parties thus circumstanced, not indeed as a substitute for the opinions of counsel, — for this it will generally be necessary to take, in order to ascertain distinctly whether there is any question fairly arguable, — but to save the expense of applying a machinery adapted for litigated cases to matters not really in litigation. At the same time we must observe that, if a rational method of pleading were generally adopted in all our Courts, a method by which the one party could simply state his case, and the other, if he did not contest its allegations, as simply admit them, all the advantages intended to be secured by this bill could be attained, with the additional one, that it would not be necessary to impose upon the parties the delay and cost consequent upon sending a case from one court to be argued in another for the information of the judge of the first; and that there would be no risk of incurring a fruitless labour and idle cost in bringing before the judge a case which he might ultimately refuse to decide. Nor would the anomaly arise of a declaration being made formally by a judge in the exercise of his judicial functions, which, after he has made it, he has no power to enforce if the parties choose to disobey it, at least without the institution of a new train of proceedings, in which the same questions may be mooted again. If the present Code of the State of New York, — with which our readers are now familiar, — were at this moment the law of England, we venture to say that all the benefits of the act we have been discussing, could be obtained by a process as little expensive as that introduced by it, and which would end in a final determination of the rights of the parties, instead of a mere declaration of what their rights ought to be.

The second object which the Legislature has had in view in the act we have been considering, is to give facilities to executors or administrators in delivering themselves from a liability to future claims in respect of their testator's estate, by setting the machinery of the Court in motion to summon all claimants before it, to come in and prove their claims or be barred of their remedy against the personal representative. By the law as it stood before, a person filling this character,

had no alternative but either of incurring such a risk as the risk incurred in Knatchbull *v.* Fearnhead [1], where an executor was held liable, after he had paid away all his testator's estate, for losses arising from a breach of trust committed by him thirty years before, although he had no notice of the breach, or of any claim in respect of it, till sixteen years after he had distributed the estate; or of sacrificing a considerable portion of the estate, in having the accounts of the remainder taken in the Master's office. A Report of the Committee on Equity of the Law Amendment Society, published in the early part of 1850, on a plan for Amending the Law relating to the Administration of Deceased Persons' Estates proposed by Mr. Turner A'Beckett, grapples with this evil, which it proposed to remedy by allowing an executor, who had parted with the residue of his testator's estate, to file in a public office a balance-sheet, verified by affidavit, showing to whom the residue was distributed, and that it was so distributed at the expiration of the time allowed by law for retaining it, without notice of any unsatisfied claim, and after the publication of advertisements, securing to creditors the same opportunity of asserting their claims, as is now given them when an estate is administered in the Court of Chancery.[2]

The act of parliament now under our notice proposes to effect a similar object, by a means not very dissimilar, though involving the necessity of greater expense. It authorizes the Court of Chancery, by order made on the motion or petition of an executor or administrator, at any time after the expiration of one year from the death of the person whom he represents, to refer it to one of the Masters of the Court to take an account of the debts and liabilities affecting the personal estate of such person, and report thereon (§ 19.). Power is given to any person who comes in before the Master upon such an order, or to the executor or administrator, within fourteen days after the filing of the report, to appeal against the allowance or disallowance by the Master of any claim made before him under the order (§§ 20, 21.). The Court is to have the same authority to make provision

[1] 3 M. & C. 122.

[2] Report, p. 8.

for the payment of any such claim, present or contingent, as it would have in a suit instituted by bill for the administration of the estate (§§ 22, 23.); and may, if it pleases, direct the Master "to take an account of all such debts and certain liabilities allowed as aforesaid which remain unpaid or unprovided for, and also the usual accounts of the personal estate of the deceased person, with all usual and proper directions" (§ 22.); and after the filing of the report may restrain by injunction any proceedings at law against the personal representatives by any person claiming to have any demand upon the estate of the deceased, except a demand in respect of a contingent liability established under the order of reference for which no appropriation has been made (§ 24.). The effect of this proceeding is to render all payments made by the personal representative on account of the estate of the deceased "as good and effectual as if they had been made under a decree of the Court" (§ 25.).

We think that these provisions are likely to prove in many cases a great advantage both to executors and administrators, and to those who are interested in the estate which they have to administer. Their operation must not be confounded with that of a claim for the administration of an estate carried on under the recent orders in Chancery. The effect of the latter is only to send the parties quickly into the Masters' offices, without the useless preliminary expense of a bill and answer; but when they get there, it leaves the accounts to be taken as they were taken before, — that is to say, there must be an account of all receipts and all payments from the death of the testator, however large the one, or however numerous the other. Under the act there will be no necessity for taking any account of the assets, unless for the purpose of making provision for liabilities established before the Master, nor, we apprehend, will any account be required of debts *satisfied before* the order of reference is made. The estate may be wound up without the expense of proceedings in Chancery, by the personal representative, who may then, by a short and inexpensive process, at the close of the proceeding, obtain through the machinery of the Court, that freedom from future liability which up to the present day he

could obtain only by employing the Court to discharge his duties.

The third object for which the act makes provision is for the hearing by the Judges of the Court of Chancery in the first instance of those exceptions for "scandal, impertinence, or insufficiency," which, by the 3 & 4 W. 4. c. 94., were directed to be heard in the first instance by the Masters, and to come before the Court only on appeal (§§ 26, 27.). The reason of this alteration is, we presume, partly to relieve somewhat the Masters' offices from the load of business which the recent legislation and alterations in the practice of the Court has thrown upon them, and partly the expectation that exceptions will not be taken on such slight grounds, when the case is to be brought to the notice of the Court, as they might be, when they need not go further than the more domestic tribunal of the Master. The act contains a power to the Lord Chancellor, with the advice and consent of the Master of the Rolls, and any one or more of the Vice Chancellors, to make orders in respect to proceedings under it, which, after being laid before each House of Parliament for thirty-six days, are to have the force of an act of parliament (§ 31.). The costs of all proceedings under the act are to be in the discretion of the Court (§ 32.).

The act to which we shall next invite attention, is one which, though at present applied only to the proceedings of the Court of Chancery in Ireland, yet seems to us peculiarly to merit notice, as indicating the sort of changes which may be anticipated in the English branch of the same Court; and which indeed during the last Session of Parliament were proposed, and though not passed into a law yet received the sanction of one House of Parliament, but (we do not know for what reason) were allowed in their passage through the other House to fall to the ground.

The act embraces a variety of objects: those which appear to most deserving of notice are as follows:—

1. To extend the power of proceeding by petition, instead of by bill or information.

2. To enable the Court to decide questions upon a special case.

3. To enable the Court to take evidence *vivâ voce.*

4. To facilitate references to the Masters in those cases where the questions in the cause are at present substantially raised in their offices.

5. To diminish the expense of proceedings before the Masters.

6. To increase the powers of the Masters, and dispense with the necessity of coming to the Court to confirm their decisions.

7. To enable the Court to give partial relief.

8. To lessen the cost and delay arising under the present practice from the transmission of the interest of parties during the progress of the proceedings. For these objects it makes provision by the following enactments.

First. It declares that, "in any case where a suit might be instituted in Ireland by way of bill or information, the persons who might have filed such bill or information" may "apply to the said Court by petition for the relief which might have been prayed for by such bill or information (§ 1.). On service of notice of such a petition, for effecting which the same facilities are afforded as exist for the service of subpœnas (§ 20.), the party so served is to be affected in the same manner as if he had appeared to a bill or information (§ 2.); the petition is to be considered as a *lis pendens* (§ 42.); and the Court is empowered to exercise the same jurisdiction upon it in all respects as it might have done on a bill or information for the same purpose (§ 2.); but with the right, either of its own discretion, or on the application and at the cost of any person "claiming to be interested in the matter of the petition, or whose rights may be injuriously affected by the order to be made" thereon, to direct that the petition shall no longer be proceeded upon, but the matter to which it relates be brought before the Court by suit (§§ 3, 4.). The petition may be verified by a short affidavit annexed or subscribed to it, in a form given by the act, and the petitioner may, either on presenting his petition, or at any later stage of the proceedings, with the leave of the Court, file interrogatories to be answered by the respondents,

upon which they are to be examined as upon interrogatories to a bill (§§. 5. 8, 9.).

A respondent to such a petition is not required to put in any defence beyond an affidavit; though he may file a cross petition, and exhibit, with the leave of the Court, interrogatories to be answered by the petitioner upon any matter alleged in the petition or cross petition (§ 9.).

Second. It allows any person not under legal disability, and any person by the direction of the Master of the Court in rotation on behalf of a person under legal disability, to present a petition to the Court "stating any document, fact, or circumstance relating to any matter falling within the jurisdiction of the Court, by way of special case, praying for the opinion of the Court" thereon, and empowers the Court to give judgment on such petition so as to bind "all such persons as it shall direct, and, in default of such direction, all such persons as presented the same," and to "have the same effect as a declaration made in a decree to which such persons were parties" (§ 10.).

Third. It empowers the Court, or any of the Masters, "in any suit or matter pending or being heard before them respectively," to direct that the whole or any part of the evidence relating to such matter shall be taken either *vivâ voce* or on affidavit, instead of upon interrogatories, or in addition to an examination upon interrogatories; and enables the Court to enforce the attendance of witnesses to be so examined (§ 12.).

Fourth. It enables the Court to refer at once to the Master by a summary proceeding, on the application of a petitioner and an affidavit in verification of his petition, any petition relating to the administration of real and personal or personal estate;—to the foreclosure or redemption of mortgages;—to the appointment of new trustees under a deed, will, or other instrument;—to the appointment of guardians and the allowance to or the maintenance of infants;—to the taking of partnership accounts;—and such other matters as the Lord Chancellor, with the assistance of the Master of the Rolls, from time to time directs by any general order (§ 16.); and it gives to the Master, upon such a reference,

"the same power to make orders, and otherwise to act in or about the matter as the Court, or any Master of the Court, could have exercised or done in or as incidental to a suit duly instituted and conducted according to the ordinary practice of the Court" (§ 16.).[1]

Fifth. It enables the Master, in taking partnership accounts, or any account where the books seem to him to have been kept *bonâ fide*, to treat the books of account as *primâ facie* evidence, and to employ and pay an accountant to make out the accounts in such form as he requires, and adopt them subject to any objections of the parties (§ 13.). It enables an executor, in taking the accounts for the administration of an estate, to prove the amount of any debt, giving notice to the creditors, who if he claim a larger amount and fails, does it at the peril of costs (§ 14.); and it enables the Master, in any proceeding before him under the act, to proceed on a copy of the petition, without any other state of facts, charge, or proposal in writing," and generally to regulate the proceedings in such manner as appears to him expedient for rendering the same inexpensive and speedy so far as justice will admit (§ 17.).

Sixth. It enacts that no order of the Master under the act shall require confirmation by the Court, "unless upon reference of the petition the Court gives any special directions in that behalf, or the Master thinks fit to make a special report" concerning the matter of the petition referred to him, or on any question or matter arising on the procedure thereupon, or to make any order subject to the opinion of the Court, to the intent that the opinion of the Court may be taken on the matter of such petition, or on such question, matter, or order (§ 19.). It places the cost of all proceedings before the Masters in their discretion (§ 25.); and for the purpose of securing uniformity of practice before them, requires them, within six months after the passing of the act, with the approval of the Lord Chancellor, to make rules as to the form of such proceedings, and for providing for a

[1] A subsequent clause (§ 22.) expressly restrains creditors from suing after reference of a petition for the administration of an estate without the Master's leave.

proper record of the proceedings before them and of their orders, which they may, with the like approval, vary from time to time. All appeals from orders made by the Master, and all special reports and orders are tobe brought before the Court on motion.

Seventh. It allows a person desirous of obtaining any portion of the relief usually granted, or which might be afforded in the exercise of any one or more of the powers, or of any part of the jurisdiction usually exercised by the Court in a suit, or which might be exercised by the Master under this act, to petition the Court accordingly, and empowers the Court to grant such partial relief (§ 26.); authorizing it also to "direct the consolidation, or to make any other order for the carrying on together of any two or more proceedings relating to or connected with the same trust or estate" (§ 28.).

Eighth. Upon the "transmission, by death, marriage, or otherwise of the interest of any party to any proceeding, whether by bill or information, in the ordinary course, or under this act, it enables any party interested to bring before the Court the person to whom such interest has been so transmitted," by a "suggestion at the foot of the original bill, information, or petition, and notice to such person;" and provides that, from the time of the service of such notice, the party served shall "become a party to the proceeding, and be bound in all respects in the same manner as if an order for revivor or a supplemental decree had been made." If any such person is under disability, the matter is to be specially brought before the Court on affidavit; and the Court is to make thereupon such order as seems just (§ 29.).

Such are the most important provisions of this important act,—an act which it will be seen combines the objects sought to be effected in England by the orders relating to claims, and by the act which we have previously noticed, so far as relates to the obtaining the opinion of the Court upon a case stated, with other objects of not less importance. We particularly value the advance made by it towards placing the Masters in that which we have long looked upon as their

proper position, — the position, namely, of judges, by whom certain causes or parts of causes should be decided in the first instance, subject to appeal. The anomaly of maintaining a large staff of officers qualified to act as judges, but who are employed only to inquire and report to another judge, who always accepts their reports as correct, unless specifically objected to, — an anomaly which never could have existed, had it not been for the origin of the jurisdiction of the Courts of Equity, — has received by this act a further heavy blow, and must, we are satisfied, soon cease to exist when the attention of the public once becomes alive to it.

The other provisions of the act to which we have called attention, seem to us generally valuable with one qualification. The plan of enabling parties to bring their cases before the Court by a simple petition, without appending to it the string of interrogatories by which the present bills are required to be encumbered, seems to us excellent. The proper time for examining the opposite party as to the truth of that which is alleged, is at a later stage of the proceeding, when it is known what he will and what he will not voluntarily admit. But to a good system of bringing matters before a court for decision, two provisions are necessary, which, on the plan adopted in this bill, are wanting: the one, a means of raising objections in point of law; the other a distinct statement of what is the case on the other side. The system adopted in the Code of the State of New York (to which we have referred in an earlier part of this number), will be found to supply both these requisites; and we cannot but think it would be far preferable to substitute at once such a system in the place of that now existing, instead of resorting to the imperfect remedy of an indefinite multiplication of petitions checked only by an occasional order, obtained at much cost, after a long struggle, to recommence the whole proceeding by way of bill or information. In such cases as those, where by the present act a summary reference may be obtained, or where under the recent orders the analogous step of a proceeding by way of claim may be substituted for a bill, the proceeding by petition is unobjectionable; but it should be confined to such cases, if that

degree of precision in statement, which is requisite for the proper discharge of the duties of the judge is to be preserved in our Courts.

Passing over some other acts, which we have already brought under the notice of our readers, we proceed to mention a third act (c. 6.), which, though classified in our analysis under the head of Laws relating to Property, bears also upon the forms of proceedings in the Court of Chancery, — the Act to Consolidate and Amend the Laws relating to the Conveyance of Real and Personal Property vested in Mortgagees and Trustees. The objects of this act, and the changes made by it, are very clearly explained in a little work published by Mr. Headlam, the member for Newcastle, to whose exertions the public are mainly indebted for this Amendment of the Law, and may be thus shortly stated. The Court of Chancery, as Mr. Headlam observes, has not ordinarily any direct power over *property*. Its decrees have no inherent force to convey or transfer a legal right or estate in lands. Its power is only that of compelling the legal owner, by the threat or the act of throwing him into prison, to deal with it as the Court may direct. In ordinary cases, this process against the *person* is sufficient to secure the performance of its orders as to the *thing*. But it may be that the property belongs at law to a lunatic, or an infant, or one who is personally incapable of complying with the orders of the Court; or it may be that the person against whom its process must be directed, is out of the kingdom, or that he will rather lie in prison than comply with the directions given to him. In such cases, the decrees of the Court would be of no avail, did not the Legislature confer upon it the power of transferring the right to the property itself, notwithstanding the incapacity, absence, or disobedience of those in whom it is legally vested.

This power, accordingly, the Legislature has for many years past conferred upon the Court in a variety of cases; beginning with the 7th Anne c. 19., by which a conveyance executed by an infant, under the direction of the Court, was made to have the same effect as if he had been of age, and ending with the 1 & 2 Vict. c. 69., an act which as well

as the 4 & 5 Will. 4. c. 33., was supplementary to that by which, under the auspices of Sir Edward Sugden, the previous statutory provisions upon the subject had been consolidated and enlarged. The grounds for introducing the present measure were these,

1st. Since Sir Edward Sugden's Act was passed, a large amount of personal property transferrable by *deed*, had been created in the shares of railways or other companies to which the provisions of that act did not apply.

2nd. The former statute, even after the emendations which it had received by the 1 & 2 Vict. c. 69., did not apply to the cases of the death of a mortgagee leaving an infant heir or when it was uncertain whether he had left an heir or not, and the payment of the mortgage-money to his personal representative[1]; nor did it extend to contingent rights in land held upon a trust; nor did it include trusts of choses in action, nor those of leaseholds where it was uncertain which of several trustees was the survivor; an omission, however, stated by Mr. Headlam to have been intentional, and to have arisen from the reluctance of Sir E. Sugden to interfere in any manner with the Jurisdiction of the Ecclesiastical Court. In all these respects the present act will be found to remedy the deficiencies of its predecessors; the word "stock," as used in it, is defined to include lands, annuities, or securities when transferrable by deed, or deed accompanied by other formalities, as well as when transferrable by entries in books kept by any company or society (§ 2.). The act is expressly made to apply to the case of a mortgagee dying intestate as to the mortgaged lands and without its being known who is his heir, and to that of an uncertainty as to the survivor of several devisees of a mortgagee, or as to whether the heir of the mortgagee be alive or dead; and to every case where the heir does not convey the lands within twenty-eight days after a proper conveyance has been tendered to him (§ 19.). Its provisions are throughout extended to contingent rights (§§ 3. 8. 11. 16. 18. 29.), and to choses in action (§ 5. 22. 27.); and it defines a contingent right so as to

[1] See Re Wilson, 8 Sim. 323.

include all the modifications of estates and rights comprised under that appellation in the 8 & 9 Vict. c. 106.; and leaseholds, as well as freeholds, where it is uncertain which of two trustees was the survivor, are brought within its operation (§ 13.); the practical convenience of the Court of Chancery being able to deal with both species of property, being considered greater than the theoretical interference with the jurisdiction which, if the uncertainty were ever cleared up, the Ecclesiastical Court might possibly exercise. For the same reason the act treats personal representatives generally as trustees to whom its provisions are to apply (§ 25.). But the act does not stop at these amendments of the law. It makes the change, a change theoretically important, and practically conducive to a simplification of the forms, and a diminution of the cost of Chancery proceedings, of giving to the order of the Lord Chancellor, in the case of lunatics, and of the Court of Chancery in other cases, the effect of at once operating to vest the legal estate in the property dealt with it if it be not stock, or the right to call for a transfer of the stock and receive the dividends upon it, and of giving the right to sue for the choses in action, or release the contingent right to which it may refer. At the same time, in order to provide against the practical inconvenience which might arise, if property should have to pass in part by the order of the Court, and in part under a conveyance executed by some other person by its order, it reserves to the Court the power, if it thinks fit, of appointing a person to convey according to the former practice, instead of making the vesting order at once (§ 20.).

Having thus given to the decrees of the Court of Chancery that character of affecting the property directly, and not only through the persons to whom they are addressed, which formerly was considered peculiar to the judgments of the Courts of Common Law, the act proceeds a step further, by enabling the Court when any decree shall be made for the specific performance "of a contract concerning any lands, or for the partition or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of lands either in cases arising out of the doctrine

of election or otherwise," to declare that any of the parties to the suit wherein such decree is made are trustees of such lands, or any part thereof within the meaning of the act, and to extend the declaration to unborn persons claiming contingent interests under any such party; and to make such orders as to the estates, rights, or interests of any such persons, as might have been made under the act, concerning the estates, rights, or interests of trustees, born or unborn (§ 30.): a power which, if exercised by the Court freely, must tend very materially to remove the distinction we have already alluded to, and obviate the evil which has sometimes occurred, of individuals preferring a life of imprisonment to the execution of an instrument affecting what they regarded as their property.

Such are the provisions of the act in respect to the conveyance of estates vested in trustees. We proceed to notice those relating to the appointment of new trustees. According to the analogy of the provisions on which we have already dwelt, they give to the Court of Chancery an increased power, authorizing the appointment of new trustees in any case where it is expedient to appoint a new trustee, and it is found inexpedient, difficult, or impracticable to do so without the assistance of the Court (§ 32.); and enabling the Court to vest the trust lands in the new trustee, and to give him the power to call for a transfer of stock (§§ 34. and 45.).

Lastly, the act contains two provisions intended to facilitate the proceedings under it; the one enabling a person who deems himself entitled to an order under any of its provisions to go before the Master, and, on proving the several facts material to the case, to obtain from him a certificate of them upon which he may found his application to the Court; the other providing that the orders made by the Court under the act, founded upon any of the allegations which give it jurisdiction, shall, "on any question as to the legal validity of the order, be conclusive evidence of the matter so alleged in any Court of Law or Equity," though without preventing the Court of Chancery from directing a reconveyance or reassignment of any lands conveyed or assigned under this act, or a

redisposition of any contingent right conveyed or disposed of by such order (§ 44.).

We confess that this provision rather startles us. If the facts on which an order is professed to be founded are not to be called in question, and the order be right on the facts as stated, on what ground is a different disposition of the property affected by it to be directed? The object of the provision is excellent, namely, to remove doubts as to the validity of orders made under the act; but we think that the proper mode of effecting this object would have been to declare, not that statements which may be false shall be deemed to be true, but that *notwithstanding* their falsehood, the order shall stand good, and the legal estate remain in the persons in whom the order directed it to vest, or in those who claimed through them. Nevertheless we believe the act, notwithstanding this and some other minor defects which might be pointed out, to be a really useful one; and as such we accept it as a valuable contribution to the great and growing cause of the amendment of the law; while it ought to be observed that, so far as it relates to the vesting of trust property in trustees by virtue of their appointment, and as it facilitates the appointment of new trustees, it carries into effect two Reports of the Law Amendment Society, received as far back as the 31st of July, 1844, and 5th of February, 1845.

ART. VII. — REFORM IN COMMON LAW PROCEDURE.

1. *First Report of the Committee on Common Law, of the Law Amendment Society, on Process, Pleading, and Practice, in the Superior Courts of Common Law.* London: 1850.
2. *Letter to Lord Campbell, Lord Chief Justice of England, on the Reforms in the Common Law.* By Sir Erskine Perry, Chief Justice of Her Majesty's Supreme Court, Bombay. Ridgway: 1850.

Reform in the Procedure of the Common Law Courts is now proceeding hopefully. The public, as well as the pro-

fessional mind is now fairly turned in that direction, and we do not despair of arriving at a satisfactory result. If a Procedure similar to that adopted by the New York Law Reformers be not introduced into this country, which undoubtedly deserves consideration, we anticipate a very great alteration for the better, and we shall proceed to enable our readers to form some opinion for themselves on this subject. With this view we shall in the first place lay before them the First Report of the Common Law Committee of the Law Amendment Society, which is well worth printing entire: —

COMMITTEE ON COMMON LAW.

The following reference was made to this Committee: —

"To consider the present state of the Law relating to Process, Pleading, and Practice in the Superior Courts of Common Law."

REPORT.

In addressing themselves to the above reference, the Committee propose to discuss the subject of practice, pleading, and process separately; and as the suggestions which they are prepared to submit with reference to pleading will necessarily, in a great measure, regulate their recommendations on the other topics, they begin upon that head.

The Committee have sought, in the first place, to ascertain those evils upon the existence of which there appears to be no material difference of opinion; and which they venture to enumerate as follows: —

1. The classification of actions.
2. The particularity required in the statement of facts.
3. The time of taking objections to the pleadings.
4. The form in which the objection is raised.
5. The effect of the demurrer.
6. The restrictions imposed upon the party in the statement of his case.

The Committee have then proceeded to the examination of

these evils, for the purpose of inquiring whether their removal, or mitigation, can be effected consistently with the due degree of precision and order which it is expedient to observe in legal procedure. And upon the best consideration they have been able to give to this subject, the Committee have come to the conclusion that the great and manifold evils of the existing system cannot be remedied by a reform of mere details, but that the system itself must undergo essential alterations.

There are certain terms essential to the institution of a law suit. The Court requires a positive statement of a matter in difference within its jurisdiction. The parties to the suit are entitled, respectively, to intelligible information as to the ground of action and defence. The only question is, what degree of precision is necessary to satisfy these requisites? A loose generality tends to confusion; and experience has demonstrated that a rigid precision leads to the same consequence.

It is impracticable to assert an abstract principle, which shall have the effect of binding parties in the ever variable circumstances of litigation. When, therefore, we say that a plain statement of a cause of action, or of a matter of defence, is all that an adversary has a right to demand, we expect the assent of every reasonable man; but the difficulty lies in applying this proposition to the contentions of uncandid disputants, who resort to words as the weapons of warfare.

The present system of special pleading is exactly adapted to such strife. It affords the fullest scope for the manœuvres of professional skill, and awards the victory, not to right and justice, but to the dexterity of the logician. Moreover, it is hardly possible to devise a mode of administering law more tedious, vexatious, and costly.

These considerations remove much of the diffidence which every well-advised person feels in adopting new measures, the operation of which must depend upon many circumstances which the contriver can neither foresee nor control. It appears to the Committee indeed, that even an ill-concerted substitute could hardly be more grievous than the present system, and it is probable that the practical adaptation

of the most carefully devised alterations will at first be attended with difficulty, and that their success will in a great measure depend on the liberal and candid concurrence of the ministers of the law.

The Committee have therefore been desirous, as far as possible, of abstaining from experiment, and of being guided by experience, in the changes which they are prepared to recommend.

The first objection that arises has reference to the division of actions.

The existing system of pleading comprises various forms of action; but the boundaries of these are, in parts, so ill-defined, as to occasion much perplexity in referring a case to its appropriate form. A misconception upon this preliminary point, however, is fatal in any stage of the proceeding. In like manner, a misjoinder of counts, belonging to different forms of action is, generally, an irreparable error.

This rigid enforcement of order has not the merit, if merit it be, of securing either uniformity in the declaration, or unity in the plaint. The distinction between the two generic divisions of contract and tort is, in practice, frequently confounded; but the pleader is, with some exceptions, which only render the rule more difficult of application, required to discriminate strictly between contracts of different kinds, and torts of different kinds in selecting the form of action. In numerous cases of contract, both express and implied, the pleader may shape his action either in assumpsit, or in case. But if he should perchance bring trespass, when he ought to have brought case, although these forms are of similar species, or if he should have joined a count in contract with one in tort, or even a count upon one kind of contract with a count upon another, — as, for example, assumpsit with debt, — the whole proceeding is vitiated. But though so much precision appears to be exacted, the anomalous licence that exists is sufficiently extensive to embrace causes of action the most remote from each other: thus, there is nothing in the rules of pleading to restrain a suitor from trying a title to personal property, and seeking compensation for injury to his character by defamation, or to his domestic

peace by seduction, in the same form of action. Practically, indeed, such incongruous issues are never coupled together, but as the possibility of such inconvenience might be urged as an argument against the abolition of forms of actions, it may be well to show that such inconvenience is possible under the prevailing system. This Committee feel no hesitation therefore in pronouncing the classification of actions to be mere pedantry, of no practical utility whatsoever, but opposing a gratuitous obstacle to the administration of justice. As a general rule, they would allow parties to include all matters in difference in the same action, but in order to obviate any inconvenience that might arise from such latitude of litigation, they would subject it to the discretionary power of a Judge at chambers. They do not apprehend, however, that a defendant would often have cause to complain of a vexatious attempt to consolidate actions, on the part of the plaintiff.

A personal action is at present commenced by a writ of summons, which is followed by the declaration. It is certainly desirable that the defendant should not be put to needless cost; and, therefore, it may be said that he should be allowed the opportunity of settling the action upon the preliminary proceeding. For this reason the Committee agree in the expediency of continuing the writ distinct from the declaration, as a step in the cause. And as in most cases the writ can, by some very simple amplification, be made to discharge the double duty of apprising the defendant, at the same time, that the law has been set in motion against him, and of the nature of the demand or complaint, they incline to think that a saving of time and expense might thereby be effected, equally beneficial to both parties in the end. If the defendant has no answer to the action, and is able, but only unwilling to make amends, he derives no benefit from a temporary respite, for which he must ultimately pay; while the plaintiff is damnified by the unnecessary postponement of redress. The Committee propose, therefore, that the writ should be served in the first instance; and after a short interval, for the purpose of affording the defendant an opportunity of settling the action without incurring further cost, the plaintiff should proceed to furnish

him with a particular of the complaint. This particular should be a plain inartificial statement for the practical purpose of giving the defendant information as to what the plaintiff goes for. A particular of demand is a document well known in practice; and though freed from all technicality, has been found perfectly to answer the purpose for which it is employed. In all actions in which the plaintiff does not specify in his declaration the particulars of the cause of action, a Judge, upon a summons taken out for that purpose, will make an order upon him to give the defendant the particulars in writing. And as the cases are very rare in which the declaration discloses the facts relied upon, the particulars are resorted to in the great majority of actions of every form — the defendant always looking to them for actual information as to the plaintiff's claim, and not unfrequently to the declaration for aid in embarrassing or defeating it.

To the difficulty arising from the distinction in the forms of action is added another, from the degree of particularity required in the statement of the case. "A declaration," says Mr. Chitty in his Work on Pleading, "should contain a statement of all the facts necessary in point of law to sustain the action; and these circumstances should be set forth with certainty and truth."

This definition would suggest the inference that the excellence of a declaration consists in being perfectly ingenuous and intelligible; whereas the contrary is nearer the truth: that it can be prepared with facility, when the draftsman has a competent knowledge of the law; whereas there is scarcely any task that requires more care and skill than the preparation of a special count. The definition of Mr. Chitty is, however, correct in its terms; the difficulties arise from the punctilious nicety with which it is carried out in practice. Not only must the principal facts be stated with a certainty, in accordance with the strictest rules of logic, but for the most part, *every subsidiary fact, which properly constitutes the legal evidence of the main case,* must be set forth with the like precision on the face of the pleading. The difficulty of complying with these requisites can be appreciated only in practice. A state paper which is to convey information to an

empire; a despatch which is to guide the administration of a distant dependency; a treaty which is to bind contending nations — is an easy task compared with the preparation of a special pleading for which the books afford no precedent.

In order to attain certainty, the rule has been established that every pleading shall be construed most strongly against the party pleading; and if the effect of this rule was to arrive at mathematical demonstration, that would, to such extent, be an argument in its behalf; but no such end is secured, for the rule fails to supply any invariable test, by which ingenious minds can be compelled to a concurrent assent as to whether a given statement exhibits an ambiguity in expression, or an omission in some particular, so as to admit a suggestion of an intendment inconsistent with its main and manifest purport. Neither is the distinction yet ascertained between matters of form and matters of substance, although a mis-statement or omission on either of these points is attended with different consequences. A science which affects such severity should, this Committee conceive, have fixed the meaning of its elementary terms.

A third grievance which the Committee find in the present rules of pleading arises from the time at which a party is allowed to take objections to the proceedings.

It might be presumed that every question relative to the sufficiency of a pleading would be discussed and finally settled before the parties proceeded to the trial of the issue which such pleading sought to raise. Such a provision, which seems obviously both equitable and convenient, would materially alleviate the stringency of those rules which are framed for the purpose of bringing the controversy to one debateable point, either of fact or of law. But this wholesome provision, which it would seem must take effect, as of course, is frustrated by the theory of pleading *which assumes that the evidence at the trial has been strictly regulated by the record.* Therefore, if there is an omission, or a defective statement of any part material to the case of either party, although the cause may have been tried, and the verdict given in favour of the party who made the oversight, the presumption arises that the proof

was defective, where the averment was defective, and, consequently, that no legal issue has been tried, and that the rights of the parties have not been determined. This presumption is in general wholly unfounded in fact, inasmuch as the Judge at Nisi Prius never advisedly permits an unconditional verdict to be entered for the party who has actually failed, without any reference to the failure in his pleading, to prove a material fact in his case. For example, in an action for a malicious prosecution the plaintiff must be nonsuited if he fails to prove that the prosecution was at an end, though he has not averred this fact in his declaration.[1] If the proof is palpably deficient the Judge nonsuits; if the materiality of the deficient proof is questionable he directs a verdict for the plaintiff, with leave to the defendant to move to enter a nonsuit, or *vice versâ;* thus referring the question of law to the full Court. At Nisi Prius, where the real merits of the case are tried, no notice is taken of any imperfection in the pleadings; all that is requisite to give the parties a *locus standi* there is, that they have joined issue upon some fact, and in no case will the Court above grant a *new trial* where the verdict was clearly right, although the pleadings were wrong.[2]

The following case is usually cited in the text books as an example of a defect in the pleading, which will be fatal in arrest of judgment: —

The plaintiff brought an action of trespass on the case, as being entitled to the reversion of a certain yard and wall to which the declaration stated a certain injury to have been committed by the defendant, but omitted to allege that his reversionary interest was, in fact, prejudiced, or to show any grievance which in its nature would *necessarily* prejudice the reversion. The plaintiff obtained a verdict, but the Court arrested the judgment for the defect above stated.[3] Now it is clear to any person acquainted with the practice at Nisi Prius, that the Judge would not have suffered this case to go to the Jury unless there had been proof of injury to the reversion. *That* was the gist of the action, and it would

[1] Whitworth *v.* Hall, 2 B. & Ad.; Mellor *v.* Baddeley, 2 Cr. & M.

[2] Edwards *v.* Broxton, 2 Cr. & J.

[3] Jackson *v.* Pesked, 1 M. & S.

have been idle to offer any evidence which did not bear upon it. The Committee may also refer to a recent judgment of the Court of Exchequer. In an action on the case against a sheriff for not arresting, the declaration stated that L. being indebted to the plaintiff, the plaintiff, according to the statute, &c., and under and by virtue of a special order duly made in that behalf by a Judge, caused a writ of *capias ad satisfaciendum* to be issued in due form of law against L., duly indorsed, &c., directed to the sheriff. After verdict for plaintiff the judgment was arrested on the ground that the declaration did not show *that the plaintiff was a plaintiff against L.*, or that he was entitled to sue out the writ of *ca. sa.* "It was suggested," said Baron Parke, in delivering a considered Judgment of the Court, "by the plaintiff's counsel, that plaintiffs could not have had any damages found for them unless they had proved on the trial they were entitled to sue out the writ by showing they were plaintiffs; but this argument is, we think, untenable. *If it could avail, every defective declaration might be cured.*"[1]

The Committee have cited these cases, as being illustrative of the extreme nicety of special pleading, as well as being subservient to the topic immediately under their consideration.

A defect in pleading may be real or accidental; the party may not have it in his power to state a better case, or, by an oversight, he may have failed to set out his case, which is in truth complete, upon paper. The rule of pleading, however, does not discriminate between predicaments essentially different. Whether the absence of the material allegation cannot be supplied, or is owing to inadvertence, the same consequence follows. The pleading is not only bad on demurrer, but on objection taken after verdict.

Motions in arrest of judgment and *non-obstante veredicto* are objectionable, therefore, for the several reasons, that they are founded upon a fictitious assumption,—that they merely uphold the ascendency of a technical system,—and that they are almost invariably in derogation of the right and justice of the cause. The Committee have no hesitation, therefore,

[1] Williams & Jones *v.* Griffith, 18 Law Journal, N. S., 4.; See also Manning *v.* Bailey, in the same book.

in expressing an opinion that they should be abolished: and with them all writs of error for defects in the pleading which might have been objected to by demurrer. These proceedings being discontinued, the party would be compelled to raise all objections to his adversary's pleading a statement at once.

This brings us to the next question, namely, the form in which the objection shall be raised.

At present, every exception to a pleading is supposed to have reference to matter of substance, or matter of form. The general demurrer is applicable to the first; and the latter is properly the subject of special ground of demurrer. And as all parties are agreed upon the expediency of discouraging merely formal and technical objections, it has been suggested for such purpose to abolish the special demurrer. If the distinction between matter of substance and matter of form was clearly defined, the proposed remedy might be effectual; but if the precise meaning of these terms respectively has not yet been ascertained, it is obvious that a rule which should prohibit objections on formal or technical grounds, would either perpetuate the vexatious disputes which it sought to terminate, or prove simply inoperative. At one period in the history of special pleading, it was debated in Westminster Hall whether the allegation of *vi et armis,* in an action of trespass, was matter of form or of substance, until the arbitrary authority of an act of parliament silenced the controversy. Questions of the same kind still arise; and as the special demurrer is equally applicable to matter of substance and matter of form, it is usual in practice to adopt that mode of procedure. And after all, it turns out that the distinction between these two kinds of demurrer is a distinction without a difference; for, by the rule and practice of the Courts, the points intended to be raised by the general demurrer must be stated in the margin. Thus the difference between the general and the special demurrer is virtually this, that the one embodies the questions of law in the text, and the other inserts them in a marginal note.

We propose, therefore, without noticing a distinction which appears to us to suggest a fallacy, that the demurrer shall

continue to set forth the points of law intended to be raised, and that these points shall be embodied in the text.

The party excepting to the sufficiency of his adversary's statement being thus required, as at present, to point out the particular in which it failed to make out a cause of action or of defence, we propose that it shall be competent to the adversary to amend promptly, without leave of the Court, on payment of the costs of the demurrer only; or if his case did not admit of alteration, he might either give up the suit, or by joining in demurrer raise an issue at law, which would thus be referred to judicial decision.

The argument upon demurrer would then cease to turn upon points of special pleading, but address itself to a question of law, the decision of which would determine the rights of the parties. The demurrer, as it obtains at present, may prove conclusive upon some point not affecting the real merits of the case; or at best, if the Court think fit to exercise their remedial discretion, the party, after being harassed by an unprofitable and costly debate, is allowed to repair the technical error in his pleading. But the demurrer restored to its proper province of raising a question of law upon facts *advisedly* stated, is manifestly a convenient mode of coming at once to the point in dispute between the parties.

Before quitting this part of the subject it may be well to notice two or three objections which might be suggested to the proposed mode of procedure. It may be said that when parties are released from observing technical forms, a pleading or statement may be so loose and obscure, that the adversary can only object that it is altogether bad, without being able to fix upon any particular defect. This case, however, would, we apprehend, be no matter of demurrer at all, but fall under the category of an insufficient particular, for which, as will presently appear, an appropriate remedy is provided. It may also be urged that the party demurring may still be dissatisfied with an amendment, after it has been professedly made in conformity with a ground of demurrer. If the party were allowed to demur again, the result might be a succession of demurrers. We conceive that a check should be administered to such vexatious proceedings. When,

therefore, the party has amended his statement in a manner purporting to meet the objection raised by demurrer, any question as to the relevancy of such amendment should at once be referred to the decision of a judge at chambers, who, for the purpose of repressing quibbles, should be entrusted with a large discretion as to imposing costs. Every cause of demurrer should, of course, be stated at one and the same time.

We now come to the consideration of the rule which makes the judgment upon demurrer conclusive as to the facts as well as the law of the case.

By the rules of pleading, a demurrer is taken to admit the truth of the facts, but to except only to their sufficiency in point of law. Therefore, in a case where both the facts and the law are disputable, the party must try both issues. If the verdict of the jury is recorded against him, but is annulled by the Court on motion in arrest of judgment, the party loses his costs, which he would have obtained had he risked the demurrer. Thus, he may at last righteously prevail, but after a vexatious delay and expense, while the public time has been wasted in deciding an unprofitable controversy. On the other hand, by the operation of this rule the party whose pleading is exceptionable loses the option of amendment, which he might have upon demurrer, and, after gaining a verdict on the merits, may be deprived of it upon some accidental imperfection in the statement of his case. In this manner both parties are damnified; for the fair litigant, deterred from at once raising the point which may be decisive of the action, is driven to a circuitous process, unnecessarily oppressive upon himself and his opponent; while an inducement is held forth to the dishonest party to harass his adversary, and to speculate in law.

Objections arising upon the pleadings being, as suggested, no longer available after verdict, the Committee see no reason why a party should be debarred from trying the issue of fact, after the issue of law has been decided against him. This is in conformity with the practice which has ever prevailed on the other side of Westminster Hall. It may well be that the facts are untrue, or incapable of proof. In either case it

is unjust and absurd to conclude the party, because, assuming that the pleading was true, he had questioned its legal effect. The Committee think, therefore, that in no case should the party, after demurrer, be precluded from pleading over. By demurring under the restrictions which have been proposed, the adversary is afforded full opportunity to amend or abandon his pleading; and if he elects to abide by it, he has no ground of complaint, if, after the legal question propounded on the other side is disposed of in his favour, the truth of his averment becomes the subject of investigation. The power which the Court at present exercises for the repression of an abuse of the demurrer will continue in unimpaired efficiency.

The Committee have hitherto supposed that the plaintiff or defendant has made an intelligible disclosure of his ground of action or of defence; in other words, that his pleading is not objected to as *defective in information*, but as setting up a case insufficient in *point of law*. They now come to a question the solution of which is supposed to involve great difficulty, namely, *to what extent* each party is to be required to condescend on particulars in the statement of his case, and how far he is to be restricted in his proof by such statement.

The principle upon which it is proposed to regulate the demurrer will, the Committee apprehend, obviate much of the difficulty in framing the particular. Every statement, however meagre, being held good enough, if not objected to in the first instance, the mean of sufficient accuracy will soon be ascertained in practice. A party will hardly think it worth while to demur, when he knows that the adversary can readily insert the deficient averment, *which he is bound to suggest*, while the existence of such a power will operate as a check upon pleadings framed with wanton carelessness or designed obscurity.

But though a sufficient case in point of law should appear on the face of the pleading, it may be that it does not contain sufficient information to enable the adversary to deal with it. To prescribe a general rule as to the degree of particularity which should be required in a pleading, might perhaps be impossible; and the Committee are of opinion that to affect the delineation of such a rule would open up a new field of

controversy, and perpetuate those vexatious technicalities which are the bane of legal procedure. The verbose artificial style of special pleading, intelligible only to professional skill, being superseded by a plain statement, sufficiently precise for the purpose of eliciting a plain and direct answer, it may safely be left to the discretion of the Judge at chambers to decide, whether a requisition for fuller particulars is reasonable, or mere cavil. The particular of demand, wherever it is employed at present, controls the proof, and is adjusted without difficulty under judicial superintendence. In every case where it is required by statute to accompany the declaration, the particular virtually discharges the whole of the duty which the declaration ostensibly performs, namely, that of giving information to the defendant. And the Committee propose simply to extend its province to those special circumstances which are now subjected to special pleading, and so dispense with the latter altogether.

Next, let it be supposed that the defendant is in possession of the plaintiff's declaration or statement of the cause of action, and put to his defence. He may wish to rest it upon several grounds, and he should be at liberty to do so without leave of a Judge. Every answer to an action must necessarily resolve itself into a denial of some material fact or facts requisite to make out the cause of action, or into an admission of the existence of a cause of action, and an averment of some new fact, by which it has been superseded. Thus the terms of special pleading require a plea to be in bar, or in confession and avoidance.[1] And the Books abound with hypercritical arguments, raised upon special demurrer, to the accuracy with which these several kinds of defence are stated. It may appear simple and easy to rule that a pleading shall be positive and not argumentative, but when the rule is reduced to practice it is found that the resources of language are very inadequate to contend with legal ingenuity. If a defendant, on being sued for the detention of the plaintiff's chattel, chooses to answer that the chattel belongs to himself, the plea is indeed argumentative, because, if the chattel

[1] We do not here advert to pleas in abatement, which are of rare occurrence.

claimed belongs to the defendant, it cannot be the property of the plaintiff; but it is mere quibbling to pretend that no intelligible issue is thus raised between the parties. The only use of written pleadings being the production of an issue which shall be intelligible to the Court and jury as well as to the parties, the Committee are prepared to discard all logical refinements in the fabrication of such pleadings, as tending merely to confusion and obscurity; insisting only upon one rule, namely, *that every fact material to the proof of the case of the party upon whom the affirmative lies, shall be taken to be admitted, if not specifically denied on the other side.* The Committee entertain no doubt that this plain principle, which is contained in the general rules of the Judges, will work without difficulty, when it is disentangled from the niceties of Special Pleading. A case once stated, the facts necessary to establish it *are matters of law, as much within the knowledge of the one party as of the other:* to exact a strict enunciation of those facts in the punctilious terms of art is therefore to impose an artificial difficulty upon the plaintiff, and to afford the adversary a possible advantage to which he is not fairly entitled. Any substantial defect or obscurity in the statement can be remedied by demurrer, upon the terms proposed, or by a preliminary appeal to a Judge, who, having the parties before him, and thus, ascertaining the nature of the claim, will readily determine whether the particular furnished, either of action or defence, communicates sufficient information or not.

The Committee think it necessary, for the purpose of arriving at a direct and intelligible issue, that the compendious form of traverse should be prohibited. The mode of pleading which they recommend will not, therefore, admit of any statement analogous to the general issue or the replication *de injuriâ.* While the Committee would dispense with the allegation of all the subsidiary facts requisite to make out a case at law, because, for the reason already stated, such information is needless, they think it both reasonable and convenient to call upon the adversary to specify each of such implied facts independently as he means to dispute. The Committee say *independently,* because it may be suggested

that when a defendant denies the existence of the contract alleged, he tenders a plain, intelligible issue. But this is a fallacy: a contract is a thing of artificial creation; and it may be that the attempt to enforce it is resisted on the ground of its being defective in some ingredient necessary to make it available at law. If the defendant means to rely on any such legal objection, it is right that he should intimate such intention, in order that the plaintiff may either remedy the defect, if curable, or abandon the suit. A plea or ground of defence that a contract was not in writing, or not sufficiently attested, in cases in which writing or attestation is required, must, if proved, prevail, but on failure of such proof, leaves the plaint unanswered. The gist of the action is the breach of the contract; but herein are two propositions involved: first, the existence of a contract; and secondly, the breach. The contract may be impeachable in point of fact, or in point of law; and if impugned at all, it is reasonable that the defendant should specify in what respect.

For example, an action for work and labour may be commenced in the following manner: —

" In the Queen's Bench.

" May 1. 1850.

" County of Middlesex.

" A. B. by C. D., his attorney, complains of E. F. The plaintiff says that he has performed work and labour for the defendant, according to a bill of particulars annexed, and he seeks to recover the amount of such bill in this action."

The Committee omit the usual allegations that " the work was done at the request of the defendant," and " that he has wholly refused to pay the plaintiff, although often requested so to do " as manifest surplusage. To such an action as this, there may be many answers. 1. The defendant may deny his liability, — he made the contract as agent for one T. S. 2. The cause of action did not accrue within six years. 3. The plaintiff is a bankrupt. 4. The work is not done according to the specification, and is worth £—— and no more. 5. A set off according to particulars annexed. To

each of these averments the plaintiff should be permitted to make one or more replies, instead of being arbitrarily and unjustly restricted, as he is by the present system of pleading, to one reply in respect of each plea. On the first ground of defence, therefore, he may tender one or two issues, either by denying the agency, or his knowledge of it, or both. It will have been observed that in accordance with the principle of stating only the main fact, the ground of defence which sets forth that the contract was made as agent, does not go on to state that the plaintiff was aware that the defendant contracted in that capacity. In order to relieve himself from liability it is necessary to affect the plaintiff with knowledge of the fact, but inasmuch as that is a matter of law, equally accessible to both parties, it is needless to state it unless the adversary by demurrer requires the fact to be stated. The party making an averment which he undertakes to verify, shall be presumed *primâ facie* in a condition to establish all the subordinate facts which must be proved to make out such averment. If any one of those facts is disputed, that is matter peculiarly within the knowledge of the adversary, and he shall properly be called upon to specify it.

To the second ground of defence the plaintiff may also have two replies. He may deny that the claim is statute run, — or he may rely on a subsequent acknowledgment to take it out of the operation of the statute. He should be suffered to reply either the one or the other, or both. With reference to the fourth ground of defence, the plaintiff may wish to take issue on the fact of the work having been done according to the specification, and upon the sufficiency of the tender, and also to aver that the specification was departed from, by the plaintiff's order; and, lastly, the set off may be open to as many answers, as if it were a substantial cause of action.

The rejoinder will of course proceed on the same principle as the previous pleading. Issue must be taken on the plaintiff's averments, or new matter must be set up in answer to them. The Committee prescribe no limit to the pleadings. Any such limit would be merely arbitrary, but by adhering to the rule, as at present established, against *departure*, that is, by maintaining throughout the altercation a consistency

of averment, no confusion can occur in the development of the issues. The question of departure should be referred to the summary decision of a Judge.

The Committee have thus endeavoured to expound the objections, as they apprehend them, to the existing system of special pleading. The principle upon which it professes to be based is that of attaining a positive issue by means of a certain and candid statement of the causes of action and of defence, respectively. But the extreme refinement affected in the mode of bringing this principle into operation has resulted in tediousness, frivolity, and chicane. Accordingly, in the mode of pleading above suggested, the Committee contemplate simply, *by divesting it of all technicality, the restoration of a plain and sensible rule to its natural operation.* The Committee see no practical difficulty whatever in the substitution of plain words for the language of schoolmen and metaphysicians. To maintain that the statement of a case in popular terms, such as are intelligible to ordinary apprehension, is a hazardous experiment, would seem, indeed, to be a stroke of satire rather than a serious proposition; but such is really the argument of those persons who would retain or merely amend the present system of pleading. The language of common sense is not, however, altogether unknown to the law. In some departments, its competency has long been acknowledged. Issues of law have always been raised by plain statements of the causes or points of demurrer; and it has never been pretended, that they are obscure or unintelligible on that account. Issues of law are also tried in the form of a special case, or a special verdict, which, though always prepared by professional skill, are merely succinct statements, in ordinary language, of the facts agreed upon or found by the jury. In the numerous cases belonging to the jurisdiction of the inferior or the irregular magistracy, in which an appeal is given, nothing more is required than an intelligible statement of the ground of such appeal. By a recent enactment the legislature has sought to discourage the technical construction of such statement. The 11 & 12 Vict. c. 31. dispenses with the necessity of setting out the evidence upon which an order for the removal of a pauper to the place of his settlement has

been founded; and, upon appeal, makes the decision of the Court of Quarter Sessions final upon any question as to the sufficiency of a ground of appeal. The act proceeds in the following terms to prescribe the rule by which these points are to be determined. After reciting that "a statement of the grounds of removal or of appeal is required to be communicated for the purpose of enabling the party receiving it to inquire into the subject of such statement, and, if need be, to prepare for trial," it is enacted, "That, upon the hearing of any appeal against an order of removal, no objection whatever on account of any defect in the form of setting forth any ground of removal or of appeal in any such statement shall be allowed, and no objection to the reception of legal evidence offered in support of a ground of removal or appeal alleged to be set forth in any such statement shall prevail, unless the Court shall be of opinion that such alleged ground is so imperfectly or incorrectly set forth as to be insufficient to enable the party receiving the same to inquire into the subject of such statement and to prepare for trial."

The Committee recommend the extension of these terms to all pleadings at Common Law; with this difference only, that in actions in the Superior Courts they think it will be more convenient that every question as to the sufficiency of the grounds of action or of defence should be decided on a preliminary reference to a Judge at chambers. The issues being thus ascertained, the cause will go down to trial.

This Report has been almost necessarily brought into comparison with the "suggestions" issued by the Common Law Commissioners. We do not think it necessary to reprint these *suggestions*, but shall reserve ourselves for the deliberate conclusions to which the Commissioners shall come in their Report, which we sincerely hope will be worthy of the great ability of the gentlemen responsible for it. In the mean time, we are not surprised that the above Report has drawn forth the impartial commendations of the great organs of public opinion, which have recently given so much of their space to the subject of Legal Procedure. In justice to the framers of this admirable document, and more especially to Mr. Massey of the

Western Circuit, who is fairly entitled to the chief merit, as being the member of the Committee on whom devolved the duty of expressing its opinion on this subject, we shall transcribe two of these opinions which have come under our notice:—

"Two separate and unconnected bodies," says the *Times* of the 2nd of January last, in one of its leading articles, "in both instances composed for the most part of lawyers, in one case wholly so, are at the present moment labouring in the vocation of reform, so far as regards procedure. The one of these is the Commission lately issued by the Crown, and the other the Society for Promoting the Amendment of the Law. Upon comparing the suggestions and views of the official and authorised inquirers with the reforms proposed by the voluntary labourers in the same portion of the Law, we frankly confess that we are grieved, though not surprised, to see that the latter have grappled far more boldly and effectively than the Commissioners with the difficulties before them; have been guided by larger and more commanding principles, and have, therefore, made what are in fact more useful and safe, though far more sweeping suggestions. Indeed the spirit that has evidently presided over these proposals inspires us with hope; for now we see a body of practical lawyers, possessed of the technical knowledge necessary for every one who desires to be an efficient reformer, yet not shackled or cramped by the prejudices which so often beset those who have laboured hard to acquire the knowledge of any peculiar or technical lore."

Thus also speaks the "Morning Chronicle" in its leading article of the 14th of December, 1850:—

"If the Society for Promoting the Amendment of the Law are not now rapidly taking the wind out of the Common Law Commissioners' sails, they are at all events affording them valuable asistance. * * * At Common Law, the technical machinery of special pleading constitutes the monster evil; and the admirable report the Law Amendment Society has just published on this subject will be studied with deep interest by all those who, while they are desirous of abating an acknowledged nuisance, are also anxious to discountenance headlong legislation."

Now it would be affectation in us if we concealed our pleasure at these commendations. Not only are these articles evidently

written by well informed and intelligent lawyers, but, finding these opinions where they are, we hail in them an expression of sentiment on the part of the public which cannot but be grateful to those gentlemen who have long laboured, humbly and unobtrusively, but earnestly and effectively, to promote the real amendment of the law. Their services are only now beginning to be duly recognised and properly appreciated. We do not hesitate to say, that if a Minister of Justice be created, which now seems probable, his best materials for dealing safely but completely with the real abuses of the Law will be found in the Reports of the Law Amendment Society. It is true that no great responsibility attaches to the members of its Committees; but this has its advantages as well as its disadvantages in the fearless prosecution of the truth; and we are satisfied that a body of this kind, formed as it has been almost always of persons who have well considered their subject, who are zealous and earnest, who are entirely unbiassed by unilateral considerations, are checked by no selfish motives, but are still restrained by the feeling that any error or false reasoning, or unreasonable or violent statement, will be instantly discovered and set right by some other member of the Society to which it will be shortly submitted — a body so constituted is we think far more likely to arrive at safe and complete conclusions than a body of Commissioners appointed by the Executive, who are usually selected on the principle of checking and controlling each other, and whose Reports are thus too frequently based on a series of poor and frequently miserable compromises, truth and boldness being constantly sacrificed to a desire for unanimity, which, considering the constitution of the Commission, is next to impossible to obtain.

But the West is not to have all the glory of proposing a great change of Procedure. While we write we receive from the East a proposition with respect to this difficult portion of Law Amendment, which is very worthy of consideration, as well from its intrinsic merit as from the quarter from which it proceeds.

The above Report, as we have seen, recommends the abolition of Forms of Action, and many other useful and well advised

changes in pleading; but in the pamphlet at the head of this article, Sir Erskine Perry, as the result of his considerable judicial experience, proposes the entire abolition of all special pleadings. He thus deprecates the wrath which he supposes may be raised among the Common Law Bar at this proposition; but we apprehend that such are the changes wrought on that body within the last few months, that his proposition may now be considered as rather tame and moderate.

"I fear that my readers of the Common Law Bar will at once turn aside from my pages, when they meet with a proposition which implies such a revolutionary movement in the whole fabric of our Common Law procedure, and will class it amongst the neologies of the day, as not worth a serious thought. But I entreat the Common Lawyers to meditate carefully over the two following well marked phenomena, which present themselves to the attention of an observer.

"First, the public demand, and not an unenlightened demand, for cheap and speedy justice, is diffusing itself so widely in society, that a readiness may be perceived to accept a very inferior system, which shall combine the two attributes of speed and cheapness, in preference to the more elaborate but costly system of Westminster Hall. Hence the wide-spread popularity of the County Courts, founded on their summary procedure, absence of pleadings, and examination of parties, which on the whole compensate for the disadvantages arising out of inability to check caprice, ignorance, and misdecision on the part of the Judge. The phenomenon is fully explained by a Persian proverb, which we occasionally hear in this country, signifying, that 'short injustice is better than tardy justice!'[1]

"Second, it is now fully acknowledged by the highest authorities in the Law, that the evils arising out of the present system of Special Pleading must be dealt with and extirpated.

"Now, to correct these evils, it is obvious that only three courses present themselves; first, to introduce alterations and amendments, after the manner of the New Rules of stat. 4 W. 4.; second, to adopt a new system of Special Pleading, as was proposed by my learned friend Sir L. Peel at Calcutta; third, to abolish Special Pleading, as has been effected partially by the Legislature of New York, and still more and completely by Parliament in the County Court system." (Pp. 7, 8.)

[1] Na huk kowta beytur uz huk darâz.

And then he proceeds to discuss the proposition which involves the total abolition of special pleading.

"I venture to offer as a solution the following scheme, which involves the total abolition of Special Pleading, and which is founded on the following principles: 1. Summons with notice; 2. Early appearance of the parties before the judge; 3. Power of mutual discovery; 4. Oral pleadings recorded by the officer of the Court; 5. Judgment moulded by the Court to meet the facts of the case.

"Now, in applying any system of procedure to the trial of Common Law cases, it is evident there are two classes of cases to be disposed of, differing much in their nature and requirements, viz. simple and complicated cases. The former class, in which there is no real defence, and generally speaking no defence at all (the Committee of London merchants, presided over by Mr. Hawes, lately made out by returns that this proportion consists of 96 per cent.) cannot be disposed of too summarily or quickly, and the admirable success of the County Courts demonstrates that for such cases a summary system without special pleading is all satisfactory. But simple cases are not to be defined by the money amount sought to be recovered in them, and the merchant's bill of exchange for 5000*l.*, or the demand for rent of a Grosvenor Square house, affords no more difficulty to the law tribunal than a promissory note for 10*l.* or the claim for a week's rent on a lodger. To all such cases, therefore, the advantage of dispensing with expensive pre-arranged written pleadings is obvious.

"There remains the class where there really is something, whether of law or fact, to try; where it is necessary to impress firmly on the mind of the Judge minute facts from which legal conclusions are deducible, where it is expedient to chalk out the limits beyond which the discussion is not to proceed at the trial — cases, in short, in which the advantages afforded by careful written statements should be available to the parties.

"It is my business to endeavour to demonstrate that the fundamental principles laid down above, with certain modifications suited to each case, are applicable to this class of cases also, and I will show practically the mode in which a complicated cause at Common Law might thus be disposed of. It is some proof of the soundness of these principles that they are capable of universal application, to a Court in the jungles of Sindh as well as to Westminster Hall, to a Court of Equity as well as to a Court of Common Law. I may observe, before going through the stages of

a suit, that I adhere as much as possible to old names and forms, as I regard every change in the forms of law as an evil *per se*, and only to be justified when a greater evil is to be extirpated.

"I. — SUMMONS WITH NOTICE.

"A summons, with particulars of demand, gives ordinarily sufficient notice to the defendant of what the claim against him is, and at this stage of the proceedings no fuller written claim is at all necessary. Although the suit be complicated it does not follow that the defendant does not know himself to be in the wrong, and an opportunity should be afforded by the most simple and economic proceeding for allowing him to come to terms with the plaintiff at once. The advantages of this practice are well illustrated by the present operation of a summons at Common Law, and the grand improvement introduced in Equity pleading by Lord Cottenham of the substitution of a *claim* for the bill in Equity, in certain cases, shows how widely applicable the principle is. If, however, it is apparent from the first that a vigorously contested lawsuit is inevitable, it should be competent to the plaintiff to expand his particulars into a full statement of his case. Such particulars under a rule of court should be paragraphed, like pleading at Doctors' Commons, and if the defendant's evidence is required, an answer in writing should be demanded to the particular paragraphs specified.

"The summons should contain the following note: —

"'The defendant must appear by himself or professional adviser at the day mentioned, but, if his evidence is necessary, his presence cannot be dispensed with.'

"II. — APPEARANCE OF PARTIES BEFORE THE JUDGE IN OPEN COURT.

"This appearance is the corner stone of the procedure now recommended. It has succeeded wherever it has been attempted, (for proofs of which assertion see examples in the Appendix) and the advantages obtainable from it, both to suitors and the ends of justice, are so great that it would require a volume to set them forth. In the complicated suit in question, for example, it appears at the first hearing before the Judge, that long and difficult accounts between merchant and agent, or claims and counter claims on builder's work, are in question, cases which all experience has demonstrated to be incapable of satisfactory decision at Nisi Prius. In all such cases half a dozen words from the Judge will usually succeed in persuading the parties (the power

indeed ought to be inherent in the Court) to refer the matter to the Master or other arbitrator, a proceeding which, after vast unnecessary expenditure, is nearly always the ultimate issue now. So also in family suits, and in disputed cases where the expense of the inquiry must very far exceed the value of the matter under controversy, an expression or two of soothing import, or pointing out the inevitable results of such litigation, from the mouth of a grave, impartial, and respected magistrate, will in very many cases at once allay hostile passions, and terminate the suit.

"But in all other cases this early presence of the parties before the Judge serves to promote the two objects in view, speed and completeness, in a manner which no other scheme holds out. If the defendant has answered by the card to the bill of discovery contained in the plaintiff's particulars, it should be open to the plaintiff, under the control of the Judge, to cross examine the defendant on the points wherein he has made insufficient disclosures, and Equity practitioners will admit that with such a check hanging over parties, who are bound to answer in writing, no skill or astuteness would suffice to enable a defendant to shut out important hostile facts. On the other hand, if the defendant has a special case of defence to set up, it should be open to either party to demand that it be put in writing, and a statement in all respects resembling the plaintiff's bill of particulars would be served upon the latter, and with the like right to demand discovery. Other incidental proceedings, such as commissions to examine absent witnesses, substitution of secondary for primary evidence, and other matters requiring the authority of the Judge, would also be disposed of at this meeting with great benefit to suitors, in point of speed and economy, and the advantages which Equity procedure affords in the easy mode by which the opinion of the Judge is obtained on interlocutory proceedings may be again referred to with effect.

III. — Discovery.

"Having already alluded to the arguments in behalf of this instrument for obtaining evidence, I will add nothing but a reference to the universal testimony of equity practitioners on the subject.

IV. — Oral Pleadings.

"The plaintiff having furnished the defendant with his written particulars of demand, in articles, obtained discovery from him, if necessary, and the defendant having served a similar paper on the

plaintiff, if he chooses so to do, such papers obtaining the specific names which practice would soon confer on them, either plaint and reply, or plaintiff's statement and reply, counterstatement and reply, &c., the principle applicable to them would be that they should each be amendable either before trial, like pleadings in Equity, and at the trial also like pleadings in Common Law; but the case as stated by the parties should never appear in more than these documents, the statement and reply. The *issues* to be raised from these cases is the subject for argument amongst the pleaders at the bar, for decision by the Judge, and for recordation (when a record is necessary) by the officer of the Court.

"At first sight this would appear to be an extraordinary departure from existing practice at Nisi Prius. But on closer examination, it will be found to correspond in substance with what usually occurs in the most important cases. In assumpsit for money had and received, in ejectment, and in many other cases, the *issue* raised by the pleader gives no information to the jury of the real matter in dispute. It rests upon the Judge to elicit from the facts proved, and from the arguments alleged at the bar what the *question* for the jury is; and, if after this inquiry, he states the question wrongly, the verdict is set aside for the misdirection. Under the system proposed, the Judge would have the opportunity of framing the *question* after perusing the carefully composed statements of the party's case, instead of the obscure and unsuggestive Nisi Prius record, and exactly the same check would be at hand to ensure sound decision. It appears to me to be self-evident that as it is impossible for strangers, professional advisers, or others, to know what the real question in dispute between ligitants is until after the most rigorous examination of the facts in the case, the framing of the issue should be left to the last stage in the suit by oral pleadings, and not be framed prematurely as at present under special pleading.

"A record of the case in the most compendious form would be kept by the officer of the Court, and in the very few cases, in which in these days a record is required for reference, it would be made up in full, with copies of all the documents filed in the case, at the expense of the applicant.

V. — Judgment of the Court.

"It is, I think, generally admitted that the ends of justice are not fully met by the stereotyped judgments of the Common Law, which are applied to all cases alike. Attempts have been made, and in certain cases successfully, to modify the judgment, by

ordering the damages to be reduced, on the performance of certain acts by the defendant; but I think the interests of suitors would be much advanced if the Court had something of the power to mould the decree which belongs to an Equity Judge. I admit the delicacy of the operation; and it is probable that the Judges of the County Court have gone too far in their practice of suspending the effects of the judgment obtained, for in most cases the self-interest of the successful suitor is more likely to discover when and how the judgment should be put in force than all the acumen of the Judge. Still the infinite diversity of circumstances in contested cases seems to make it proper that the Judge should have power to modify the judgment to the case.

"Finally, it is an essential requisition for the working of this system, that a judge should always be sitting at Nisi Prius during the year. The cases which come under the category of 'simple,' should evidently be disposed of without the intervention of a jury; but for all cases of complication and for real trial, I should be extremely sorry to see this time-honoured institution, with all its collateral advantages, fall into desuetude. It is evident, therefore, that, with a very slight alteration in existing arrangements, the system proposed might come into operation by a puisne judge sitting every day for simple cases, and for preliminary inquiries, while the Chief Justice and the judges on circuit would take the sittings after term and assizes, as usual, with a jury for all complicated cases." (Pp. 15—23.)

We have thought it right to make this long extract because, in the present state of this most important question of procedure, we are bound to submit to our readers every well digested plan, especially one which thus comes recommended as the result of much thought and a long and varied experience in many branches of jurisprudence. Sir Erskine justifies it "by the invariable success which I have observed to attend upon the introduction of its leading principles wherever it has been made, both in the Supreme Court of Bombay and elsewhere. Of late years, my learned colleague, Mr. Justice Yardley, and myself, have raised the jurisdiction by summary procedure, from 35*l.* to 60*l.*, we have adopted the same principles by consent in several complicated cases arising on the Equity, Ecclesiastical, and Admiralty sides of the Court, and *vivâ voce* examination of witnesses is now the general rule of the Court in all proceedings."

And what is the result of all this in a *professional* point of view? How are what are called "*the interests of the profession*" affected by these changes? Let any of our readers affected by fears on this ground, attend to Sir Erskine's evidence on this point.

"The profession will be happy to learn that, with all this simplification of procedure, and consequent diminution of expense, the amount of business, and the prospects of practitioners were never so flourishing as at the present moment. And although I have alluded in a previous page to the Lawyer panic which raged some two or three years ago in Bombay, and which was elicited by an attempt to introduce into the Supreme Court many of the simple principles of procedure afterwards established by the Small Cause Act, an attempt which for about two months conferred on me the distinction (in the language of the 'Friend of India') of being 'the best abused man in the East since the time of Lord William Bentinck,' I am happy to think that the interests of the suitors at large are found on the whole to coincide with those of the profession, and it is a matter of the deepest congratulation to me that the leaders of our Bar, men competent to lead in any Court of the Empire, most warmly co-operate with Mr. Justice Yardley and myself in our attempts to make all our procedure cheap, simple, and effective." (Pp. 24, 25.)

This only confirms our own opinion repeatedly expressed. How often must we exhort our professional brethren to be wise in time; to learn that he is the truest friend of professional interest who renders the law simple and popular. We would ask, Who best deserves the character of the lawyer's friend? He who facilitates the passage of the suitor through the palace of justice, or he who embarrasses his entrance into it, or when once in, will not let him out again? Experience will show, that in England as well as in India, it is the former and not the latter; and although in the one country as in the other, it will be his lot to be "abused," yet in time justice will be done to him; and although for a brief moment the evil speaking may prevail, and possibly give him pain or do him wrong, yet he has only to keep in mind his great object, and in its success, and not in the opinions of man, he will find his abundant and sufficient reward.

ART. VIII.—THE UNITED CHURCH AND ITS SYNODS.

1. *The Book of Common Prayer: The text taken from the Manuscript originally annexed to stat.* 17 *&* 18 *Car. II. c.* 6. (*Ir.*); *with an Historical Introduction and Notes.* By ARCHIBALD JOHN STEPHENS, Barrister-at-Law. In three volumes. Published for the Ecclesiastical History Society, 1849–50. [1]

2. 39 *&* 40 *Geo. III. c.* 67; and 40 *Geo. III.* (*Ir.*), *c.* 38. *Acts for the Union of Great Britain and Ireland.*

WE propose calling attention to that portion of the Union between Great Britain and Ireland contained in the Fifth Article. This provision in both Statutes of Union is expressed as follows:—

[1] In vol. ii. p. 369. we noticed Mr. Stephens's edition of the book of Common Prayer, taken from the sealed books. We then mentioned that the learned editor had also published two volumes of the work placed at the head of the present article, which is now completed by the addition of a third volume, enriched with a learned Introduction, forming a valuable supplement to the Introduction prefixed to the first volume, and throwing additional light upon the important matters therein handled, especially in all that relates to the connection between the English and Irish churches before their Union. In furtherance of his object, as will be seen from both introductions, the learned editor has taken no small pains to obtain information from the best sources: his own observations are interspersed with communications from several learned contributors; especially the late Bishop of Meath (Dr. Stopford, who edited an Irish edition of the Prayer Book, in 1846), and Dr. Elrington *, late Regius Professor of Divinity in the University of Dublin, whose deaths the church and nation have now to deplore, from the Archdeacon of Meath, the Rev. Dr. Todd, and the Rev. J. Jebb. From each of them Mr. Stephens has derived more or less of aid in his complete—indeed exhaustive—vindication of the Union of the two churches into the "United Church of England and Ireland."

The manuscript of the Irish book is the only original manuscript of the liturgy now to be found. The four manuscript liturgies (viz. the two liturgies of Edward VI., Elizabeth's liturgy, and that of Charles II.), originally attached to and forming parts respectively of the four English Statutes of Uniformity, have severally been detached from the Acts to which they belonged, and have disappeared! The latest, and now most important of them, (the existing Liturgy,) was last seen about sixteen years ago, in its proper repository, the Parliament Office, but detached from the 13 & 14 Car. 2. c. 4. See 1 Stephens's English Prayer Book, Introd. clxxiv.

* Mr. Stephens has paid a well-merited tribute to the memory of Dr. Elrington, vide 3 Steph. Ir. Pr. Book, Introd. iii—xvi.

"Art. V. That it be the fifth Article of Union, that the Churches of England and Ireland, as now by law established, be united into one Protestant Episcopal Church, to be called, *The United Church of England and Ireland;* and that the doctrine, worship, discipline, and government of the said United Church shall be, and shall remain in full force for ever, as the same are now by law established for the Church of England; and that the continuance and preservation of the said United Church, as the established Church of England and Ireland, shall be deemed and taken to be an essential and fundamental part of the Union."

The two Acts of Union of which this fifth Article forms an essential and integral part, stand upon a peculiar footing. Although, in point of strict law, they are subject to all the incidents of other acts of parliament, and therefore may be repealed at the will of the Legislature (whose competence cannot be restrained within any express limits); yet, constitutionally, such an event is regarded as one of those great improbabilities, or almost impossibilities—like the Sovereign becoming a Papist — from the prospect of which every good subject is expected to avert his eyes,—the happening of which is not to be pre-supposed, — insomuch that no provision is made by law for the mode of procedure in such events. An endeavour, therefore, to bring about a repeal of these fundamental Statutes has been treated as amounting to a species of disloyalty. Accordingly, when, some years ago, an agitation was got up in Ireland with that object, the Government of the day did not hesitate openly to visit with signal marks of its displeasure all those who took a part in the agitation, however peaceably conducted: magistrates who joined in the cry were removed from the Commission of the Peace; it was publicly notified that all pensioners attending any meeting to petition Parliament for a repeal of the Union should be deprived of their pensions: and we happen, ourselves, to know of an instance, in which the Government refused to appoint a gentleman as High Sheriff for his county, until he had given a distinct pledge that he would not attend a Repeal meeting, though he actually never had attended such a meeting.

Now, these were acts of power, in our opinion, perfectly

justifiable, but chargeable with the imputation of unconstitutional tyranny,—of a most unwarrantable interference with the sacred right of petitioning,—were it not for the still more sacred character of that most important, most indispensable international arrangement, concluded for ever by the two acts in question. "*Repeal the Union! Restore the Heptarchy!*" was Canning's pithy and conclusive argument. But though the scheme, if successful, of the agitators for Repeal would doubtless have involved an entire repeal of both statutes, yet the particular point more directly aimed at by them was the repeal of the 3rd Article of the compact, providing for the union of the *legislatures* of the two islands. Every other article, however, is equally sacred: the whole contract must be taken together; each article guaranteed forming a consideration for all the rest. Besides which, it is now impossible to replace the contracting parties in the same relative position in which they stood previous to the Union. Whatever, therefore, may be urged for the sanctity of the 3rd Article, applies with no less force to the 5th, which assures the Union of the Churches.

It is against a systematic disowning—not in Ireland, but in England,—of this 5th Article, sometimes avowedly in words, but more generally in practice, that Mr. Stephens's arguments, in the able work before us, are directed. And we think that he has done a public service by calling attention to the point: because it is of the last importance that perfect good faith should be kept in adhering both to the letter and the spirit of this Article, not only on account of its own individual claim to respect, but also because the dissolution or nonfulfilment of so essential a part of the entire international compact, affords a ground for annulling or repudiating every other part.

The observations and arguments of Mr. Stephens embrace four leading propositions:—I. That, in a spiritual point of view, the union between the Churches of England and Ireland was virtually complete, before the passing of the two acts of parliament, by which acts their temporal union was effected. II. That, therefore, any concurrent synodical sanction of that union, by a formal Act of Convocation, (for

which some contend,) was wholly uncalled for. III. That the Union, as effected, implies a constitutional necessity of having the Irish portion of the United Church duly represented in any synod which may hereafter be summoned for advising upon or determining any question concerning the Church at large. And, IV. That, hitherto, the Union of the Churches has been practically disregarded, greatly to the public detriment.

I. With respect to the first of these propositions, Mr. Stephens shows that for upwards of six centuries, viz:— from the Synod of Cashel in 1172, till the Union of 1801, the Irish Church, though separate and distinct, always aimed at assimilating itself with the Church of England, which it took for its model, preserving only such slight modal differences as are incidental to a state of independence. It would seem that one obstacle to an earlier assimilation arose, in a great measure, from the different origin of the two churches: Ireland's "church was founded independently of Rome; whereas the Church of England, in the Saxon part of the province of Canterbury at least, was established by a missionary from Rome, in the person of Augustine." The first recognition of the Papal authority was the act of Malachy, who had resigned the Primacy in 1137; but who, in 1139, (not 1134, as Mr. Jebb states) at the instance of the Irish clergy, opened a negotiation with Rome, which terminated in an acknowledgment of the Papal supremacy, at the Synod of Kells, held in 1152, during the primacy of Gelasius, Malachy's successor.[1] "There the four palls for Armagh, Dublin, Cashel, and Tuam, were distributed, and fixed suffragans allotted to the four archiepiscopal sees."

The motive which probably induced this step is thus explained by Mr. Jebb[2]:—

"It is very probable that the Irish Church did not contemplate the virtual surrender of Irish independence implied in this step. The full claims of Popery, in all likelihood, were not yet understood in a nation so remote and insulated as the Irish. It would rather appear that Malachy, a zealous and virtuous prelate, was de-

[1] Harris's Ware, vol. i. pp. *55. 58.*

[2] Letter to Mr. Stephens: Introd. to vol. iii. p. lxxvii.

sirous of conforming the Irish Church (into which many barbarous practices had avowedly crept,) to the example of other nations, not indeed more pure in doctrine, but presenting a more perfect organization, and more civilized than his own; and especially that he was actuated by the example of England, whose ecclesiastical influence had been felt in the three Danish cities of Ireland" (Dublin, Waterford, and Limerick). "However this may be, it is certain, that in this instance, the Irish Church surrendered her pristine liberty to the Papal power, just as England did."

Twenty years later followed the submission of Ireland to Henry II., and the introduction of the English laws and civil polity into that country. Mr. Jebb adds: —

"The assimilation of the Church was in like manner, and *pari passu*, contemplated and undertaken. At the Synod of Cashel, in 1170 (*read*, 1172), which was in fact a plenary council, both national and ecclesiastical, as perfect a synod as any which was then known in Ireland, the fraternity of the two Churches was acknowledged and confirmed. In a word, they were united, so far as union could exist between the Churches of two countries, having separate though similar civil institutions. At that council the King's determination, 'ecclesiæ illius statum ad Anglicanæ formam redigere omnibus modis,' was assented to. This is attested fully by Giraldus Cambrensis, then in Ireland, and by Matthew Paris.[1]

"And this principle is supported by the uniform course of events till the reign of Henry VIII. Not only do the Irish Acts of Parliament recognise the intercommunion of the Churches, but we find Archbishops of Dublin assisting at English Councils; we find Archbishop de Loundres, in the thirteenth century, setting the example, which was followed by all the Churches of which any record remains, of establishing the ritual of Sarum, and of moulding the cathedrals of the land to the constitution of that Church. In every essential particular the framework of the two establishments was identical; in some instances, as in the now almost obsolete archdiaconal jurisdiction, more fully than at present. And this without

[1] Ware, or rather his editor, Harris, gives shortly the substance of the canons passed at this council. His enumeration concludes thus: — "That divine service be observed in Ireland as in England. And so says Cambrensis; having owned the King supreme in Church and State, he confirmed their canons: and, at the same synod, the laws of England were thankfully received by all, and the observance of them confirmed by an oath." (Ware's Works, by Harris, vol. i. p. 468.)

any reclamation on the part of the Irish Church, which still retained the most important features of her ancient system, her own synods, and (what she still maintains in full operation) the periodical visitations of her metropolitans."

In Ireland the Reformation was not less complete, regular, and general, than it was in England.

"In 1537, not only did the Irish Parliament abjure the Papal jurisdiction, and most of the clergy, as it would appear, take the oaths of regal supremacy; but 'the native princes and lords,' as Mr. Palmer states, (Treatise on the Church, vol. i. p. 551, et seq.) 'consented universally to take this oath, and make indentures to the same effect with the King.'"

The spiritual reformation proceeded regularly and successfully under Edward and, after the temporary check it suffered in Mary's reign, under Elizabeth. There was no substitution of one church for another, as is sometimes most erroneously imagined; no wholesale displacing of the clergy of one denomination to make room for another set. There were indeed some deprivations, but they were too few to afford any pretext for the notion that the continuity of the Church was broken. Primate Dowdal was displaced by King Edward, irregularly, it would seem: he was restored by Queen Mary. She expelled five bishops favourable to reformation; of whom two only were restored under Elizabeth, they having been *illegally* displaced under Mary. "Of Queen Mary's bishops and of some appointed by the Pope (and that is a strong case), some avowedly, others tacitly, acquiesced in the Reformation, and the great body of the clergy concurred." On the part of the people, too, there was a general and long-continued acquiescence.

Thus the Reformation in Ireland was not a revolution: it was effected constitutionally and peaceably. The defection of a majority of the inhabitants of Ireland to the Romish Communion, was a subsequent affair; and it was the *consequence*, not the *cause*, of open rebellion against the Queen's authority, aided and abetted by foreign interference. As Mr. Jebb writes:—

"The schism which took place at the end of the sixteenth century,

was caused, not by any reclamation of synods or of bishops, either deposed or in actual possession, but by the intrigues of the Spanish King and of the Pope. . . The Pope, in defiance of the existing bishops, and in direct hostility to the lawful sovereign, obtruded foreign ecclesiastics, in no way deriving their succession from the Church of St. Patrick, themselves the abettors of treason and rebellion." (P. lxxv.)

It is true that vast numbers were seduced from their allegiance to the State, and, as a consequence, from their duty to the Church. Nevertheless, the lawful institutions of the country survived; and the ancient Church of Ireland, freed from its dependence on Rome, maintained its just supremacy, though with diminished numbers of faithful adherents.

In "doctrine, worship, discipline, and government," the reformed, like the unreformed, Church of Ireland, followed the Church of England as its model.

First, *in worship;* as shown by its adoption, through every phase, of the English ritual: which ritual, be it remembered, commits the Church adopting it, to doctrine. That ritual assumed successively five different forms, namely, the first and second Prayer Books of Edward VI., Elizabeth's Book, James the First's, and Charles the Second's.

The use in England and Wales of King Edward's First Prayer Book was enjoined by stat. 2 & 3 Edward 6. c. 1.

"It was not until February 6th, A.D. 1551, that an injunction was sent by Edward VI. to the Lord-Deputy to have the English Book of Common Prayer read in the Irish churches. Immediately Sir Anthony St. Leger summoned the whole clergy, but not as a Convocation, for the 1st of March, to acquaint them with his Majesty's commands; and after some opposition from the Archbishop of Armagh, and several bishops, a proclamation was issued for carrying the order into effect, and thus the English Prayer Book began to be publicly used on Easter Sunday (March the 29th), in Christ Church Cathedral, Dublin." (1 Steph. Ir. P. B. Introd. iv.)

The use of Edward's Second Book was prescribed by the English stat. 5 and 6 Edward 6. c. 1. This book does not appear to have been ordered for observance in the Irish Church, during the short period between its enactment and Edward's

death, when all his statutes concerning religion were repealed, and the use of the English Liturgy was suspended.

Elizabeth's Prayer Book was made law in England, by stat. 1 Eliz. c. 2. Legal sanction was given to it in Ireland, by stat. 2. Eliz. c. 2. (Ir.), after having, for a time, been voluntarily adopted without legislative imposition.[1]

It may be here observed, with reference to the two last-mentioned English Liturgies, that although the assistance of the most learned divines of the times was employed in their preparation, they did not, previously to or concurrently with their legal enactment, receive the formal synodical sanction of the English Church, as represented by its two Convocations. A still greater irregularity was practised in respect of James the First's Book. That monarch, of his own mere authority, and without the sanction of either convocation or parliament, caused certain alterations to be made in the then existing Liturgy (Elizabeth's); which, however, though possessing no legal or ecclesiastical obligation, were willingly accepted and acted upon by the church and country.

"James's edition of the Prayer Book was received by the Irish people without remark, as a necessary consequence of its adoption in England. In 1634, the third of the Irish canons imparted to it, at least, ecclesiastical authority, unless the words, 'That Form of Liturgy, or Divine Service, which is established by the law,' are to be exclusively applied to the only book they accurately describe, the Prayer Book of Elizabeth. Whichever book was meant (and the probability is much in favour of the former) the same, in an Irish translation, the churchwardens were to procure, by the ninety-fourth canon, for every place 'where all, or the most part of, the people are *Irish*.'"[2]

In all these acts, however, a hearty and something more than tacit assent was given by the clergy, who then could have expressed their dissent, had they thought fit, through their synods.

Lastly, Charles the Second's, which is our present Liturgy, was passed, in both countries, with perfect regularity; in

[1] Heylin's Hist. Ref. vol. i. p. 261.; 1 Steph. Ir. Pr. B. Introd. viii.

[2] Clay on the Irish Prayer Book; British Magazine, Dec. 1846, p. 607.; 1 Steph. Ir. P. B. Intr. xxviii.

England by stat. 13 & 14 Car. 2 c. 4.; in Ireland, by 17 & 18 Car. 2 (Ir.) c. 6.; in each country having first received the synodical sanction of the Convocation.

The particulars in which the English and the Irish version of this Liturgy differ from each other, are few and unimportant. The Irish Book adds a prayer for the Lord-lieutenant in the Morning and Evening Services. It omits (that is to say the MS. in its present condition omits) the title-page, "The Preface," the Introduction "Concerning the service of the Church," "Of Ceremonies," the Tables of the Moveable Feasts, and for finding Easter, and the two rubrical directions, headed "The Order for Morning and Evening Prayer;" all of which are in the English Book. But, in all probability, the leaves containing these portions may have been lost.[1] However this may be, with the above exceptions the two versions are verbatim the same, save that possibly there may be in the Irish a few corrections of plainly clerical errors occurring in the English book. *Literatim* the same, they certainly are not, as the spelling in the Irish book varies a good deal from its archetype. Closer conformity, *in worship*, could scarcely be expected or desired.

Next with respect to conformity of *doctrine*, as exhibited in the Articles adopted by the two Churches respectively. We may pass over the reign of Henry VIII., during which the spiritual Reformation had scarcely commenced. We may likewise pass over Edward's reign; for though in England certain Articles were framed in 1552, they were not generally acted upon, nor were they confirmed by Parliament, or even[2] by full Convocation. Had it been otherwise, however, there was scarcely time, in the short interval before Edward's death, for them to have found their way into Ireland. Coming then to Elizabeth's reign, Burnet tells us that in 1559, "three things remained to be done. The first was to set out the doctrine of the Church as it had been done in King Edward's time. * * * The *bishops* therefore set about these. And

[1] Dr. Elrington shows, from internal evidence, that the MS. is incomplete Vide 1 Steph. Irish Pr. Book, Introd, cxxi.

[2] Vide Collier, vol. ii. p. 325. fol. ed. 1714.

for the first, though they could not by public authority set out the Articles of the Church till they met in a Convocation, yet they soon after prepared them. *And for the present,* they agreed on a short *profession of their doctrine,* which all incumbents were obliged to read and publish to their people."[1] In 1562, the full "Articles," here referred to by Burnet (our present Thirty-nine Articles), received the sanction of Convocation.[2] Eight years afterwards, they received the sanction also of Parliament, by stat. 13 Eliz. c. 12., enforcing subscription by all ecclesiastical persons, to a printed English edition of them.

The Irish Church adopted successively both sets, the short or provisional Articles of the English bishops, and the Thirty-nine Articles of the English Convocation; but, in doing this, lagged considerably behind her English sister. The former were not put forth in Ireland until 1566.[3] How soon afterwards the Irish Church adopted the English Thirty-nine Articles, is a point upon which we have no distinct historical evidence; nor is it now of much consequence. It is tolerably plain that they were adopted, at all events, in 1634, and that they have been in force ever since. This is a question, however, which has excited a good deal of angry controversy of late; and no small portion of both introductions is occupied in its investigation and discussion by Mr. Stephens and his clerical correspondents.

We shall state, very shortly, how the controversy has been occasioned. In 1615 Archbishop Ussher (clarum et venerabile nomen!) prepared a distinct set of Articles for the Irish Church, and pressed them upon the acceptance of the Irish Convocation in that year, but unsuccessfully. At least the weight of evidence strongly preponderates in favour of the view that they did not receive the sanction of Convocation. There is a dearth of authentic records of the proceedings of that body; and the evidence that the Articles were accepted,

[1] 2 Hist. Reform. 727. (Ed. Oxf. 1816.) These short Articles are given by Burnet in his Collection: id. part II. 507.

[2] Wilkins's Concilia, iv. 233—8.

[3] 1 Steph. Ir. P. B. Introd. xvi. At p. xix. these Articles are given. They are verbatim the same with those given by Burnet.

rests upon the testimony of a single witness, Dean Bernard[1], strongly biassed in favour of Ussher's views, but, independently, of doubtful credibility. He professes to narrate what took place at the Convocation in question, having been present at it. His testimony is contradicted by other and more respectable witnesses, likewise present on the occasion, as also by certain historical probabilities. The probable conclusion, therefore, is that these articles were not then sanctioned by the Convocation. But, supposing that they were, it is not denied that at a subsequent Convocation, held in 1634, the English Thirty-nine Articles were formally adopted: the only question of fact then is, whether, either formally (as to which, again, the historical evidence is defective) or impliedly, Ussher's Articles, if ever in force, were not thereupon entirely abrogated. It would seem that they were; and in corroboration of this probability of fact, or fair inference of construction, we have the testimony of the best-informed Irish Churchmen, that there is no trace of these Articles having been *practically* enforced since 1634; that few Irish clergymen within living memory have heard of them, fewer still read them, and none subscribed them; that the Thirty-nine Articles alone are taught in the University of Dublin, recognised by the Irish Bishops, and subscribed by the Irish Clergy.

As to the substance of Ussher's Articles, they are not inconsistent with the Thirty-nine Articles. In general there is a perfect agreement; but, in some points, they are more dogmatically explicit, and decidedly Calvinistic; still, however, within the latitude conceded by the English Articles themselves, as allowed by sound divines.

Such appears to be the true state of the case. This, however, will not satisfy a certain party, who choose to consider the Irish Church to be not only committed to Ussher's Articles, but also to have incurred thereby the taint of *heresy*, for itself, for all its members, and for all who hold communion with it! The party here alluded to is, or was, headed by a clergyman who lately acquired notoriety by apostatising to Rome. He gravely propounded his charge of heresy in a

[1] Vide 1 Steph. Ir. P. B. Introd. p. xcii. *et seqq.*

pamphlet published after his resolution to secede had been formed; at a time, therefore, when he must have been nearly ready to make a similar charge of heresy against the English branch of the Church, and to promote the downfall of both branches by fomenting a schism between them.[1]

There prevailed also substantial unity of *discipline* and *government*. The form of government, and general structure and framework, were essentially the same. The Canons which regulate the English branch are those passed by the English Convocation in 1604. The Irish Canons in force at the date of the Union were passed at the Convocation of 1634, and are not identical with the English. But there is no material difference between the two sets: in fact, any points of distinction that existed in discipline or government between the English and Irish Churches were extremely trifling, and such as might well subsist between two provinces of the same Church, and such as do obtain, in some particulars, between the provinces of Canterbury and York.

To the conformity of the Churches with each other, in the several points above specified, may be added the complete and unquestioned *intercommunion* between them, which has obtained at all times, practically corroborating an entire agreement in every particular which could be deemed essential in a spiritual point of view.

What then remains, for the consideration and adjudication of an Ecclesiastical Synod, in order to effect a complete union between the Churches so related? Absolutely nothing. What remains is a matter of purely civil or temporal consideration and adjustment.

And this brings us to the *second* of the propositions indicated at the commencement of this Article, viz.;—

II. That any concurrent synodical sanction of the union of

[1] As a specimen of Mr. Maskell's candour, we need only refer to p. xliv. of Mr. Stephens's Introd. to vol. iii., where the learned Editor exposes Mr. M's mode of misrepresenting the effect of one of Usher's Articles, by citing half of it. The omitted part being the same in substance as "that which is asserted in the ancient book of Ratramnus, the reading of which was the occasion of Bishop Ridley's, and by his instigation, of Archbishop Cranmer's investigating and *repudiating* the doctrine of Transubstantiation, and of the recovery of the primitive doctrine of the Church on the subject of the Eucharist."

the Churches by a formal Act of Convocation, was wholly uncalled for. Of this opinion is one of Mr. Stephens's clerical correspondents, Mr. Jebb: he writes: —

"The only union then that was necessary, was that of a political kind. When, therefore, the kingdoms became politically one, and when the Lords Spiritual of Ireland became associated with those of England as the Parliamentary representatives of the Church (which is avowedly but one of their two functions), the identification of the two Churches necessarily followed. . . . . It cannot be seriously questioned that the Sovereign, with the consent of the Parliaments of the two nations, was perfectly competent to alter the ancient designation of the National Church, (always one in spirituals) when *England* and *Ireland* legally existed no longer. Especially when not a breath of reclamation was ever raised against this measure, forming an integral part of that most solemn Act of Union, of which the whole Church and State were cognisant. The Spiritual Lords of either country entirely assented. Not a single dissentient voice among the twelve thousand clergy was ever heard. And if this be not a recognition of this most patent Act, I do not know what Act is valid."[1]

We must, however, take the liberty of differing, in one point, from the writer of this passage. The legislative Union of the Churches implies more than a mere change of designation; it involves matters of substantial import, as we shall presently show.

We would not, indeed, be understood as maintaining that, in any case whatever, the consent of Convocation is essential to give legal validity to an act of parliament. On the contrary, it is impossible to limit the power of the Legislature. So that a statute declaratory of doctrine, though passed without the assent of Convocation, would be law, however erroneous or absurd. We speak not now of the constitutional propriety of such a proceeding, or the insult that would be offered to religious feeling, and to ecclesiastical principle: we speak only of its strictly legal validity.

In Middleton *v.* Croft[2], Lord Hardwicke says: — "In all the acts of parliament since the Reformation for confirming

[1] 3 Steph. Ir. P. B. Introd. lxxxvi.

[2] 2 Atk. 650.

forms of prayer and other ecclesiastical constitutions, the preambles show the clergy in convocation were only considered as the proper assembly to prepare and propound them, *but not to enact or give them their force.*" And there is abundant authority to prove that Convocations, in such cases, are nothing more than the constitutional assistants or advisers *in spiritualibus* of the Parliament, in the same way that the fifteen judges are the constitutional advisers, in matters of law, of the House of Lords.

But though such be the *power* of the Parliament, in point of strict legal competency, it cannot be denied that there is a constitutional, or moral obligation (an obligation which, however, cannot be enforced, should the Parliament think proper to dispense with it) to take the advice of the national synod of the Church, before proceeding to legislate upon spiritual matters, as was done when the Thirty-nine Articles and the Book of Common Prayer were enacted. The question then is, what are spiritual matters of a kind requiring such advice? Articles of religion, formularies of prayer, and other matters involving doctrine, government, and, to a certain extent, ecclesiastical discipline also, are such. But the functions of Synods are not so properly applicable to temporal matters, though relating to the Church; such, for example, as the territorial arrangements of dioceses, or the appropriation of ecclesiastical property; concerning which a layman may be as good a judge as a divine. This latter observation is applicable to every thing affected to be performed by the legislative union of the churches. It being indisputably established that, in all their spiritual relations, there already pre-existed a complete unity between them, the advice of an ecclesiastical synod could not be requisite to determine the propriety of their political union.

III. We now come to our *third* proposition: that the Union as effected, implies a constitutional necessity of having the Irish portion of the United Church duly represented in any synod which may hereafter be summoned for determining any spiritual question concerning the Church at large.

On consideration, we are compelled to differ from Mr. Stephens and his correspondents upon one point — that the

union of the *legislatures* necessarily draws with it an union of the churches of the two countries. Now this is not so. Had the legislatures so willed it, the Acts of Union might have omitted the 5th Article, and have left the two churches, however similar in all essentials, and enjoying perfect intercommunion, still legally distinct. Had this been done, the relative position of the churches would have been as follows: the ecclesiastical synod of each country, acting and judging independently, might have suggested to the common legislature of both countries, distinct and dissonant ecclesiastical laws, resulting in a divergence between the churches in respect of doctrine, worship, discipline, or practice. It is true that a limit would have been set to this divergence by the Act of Union between England and Scotland, which provides for the inviolable maintenance of the Church as then established in Ireland as well as in England[1]; still the Queen's conscience might have been capacious enough to consent to the establishment of partial differences, without impairing the essential character of either church.

But as the case actually stands, this is forbidden by the insertion of the 5th Article in the Acts of Union between Great Britain and Ireland. By the tenor of that article, the Churches are not simply preserved, they are absolutely fused into one, in terms which exclude the idea of any partial legislation for either branch separately. And that such was the mature and deliberate intention of the statesmen and legislators who promoted the measure, — that such was the understanding upon which the compact was accepted, — no reader of the debates of the period can for a moment doubt. Indeed, in any other sense, "the union of the churches" is a phrase utterly without meaning.

What therefore is the consequence? Namely this: that whenever it shall be requisite for the United Parliament,

[1] Stat. 5 and 6 Ann. c. 8. s. 8. provides that the Sovereign, "at his or her coronation, shall . . . . take and subscribe an oath to maintain and preserve inviolably the said settlement of the Church of England, and the doctrine, worship, discipline, and government thereof, as by law established within the Kingdoms of England and Ireland, the dominion of Wales, and town of Berwick-upon-Tweed, and the territories thereunto belonging."

legislating, as it must, for the *whole* United Church, to take constitutional advice, it ought to seek it at the hands of a *complete* synod of the whole Church. "It is now agreed that the Convocations are of right to be assembled concurrently with Parliament (2 Burn's Eccl. L. Phillim. ed. 30.), the writ summoning the clergy concurrently with the peers and commoners having been issued from the time of Edward I. to the reign of her present Majesty."[1] Again, it has been constantly laid down as a fundamental principle of the constitution, as well as of the Christian Church, that a national synod should include representatives from every portion of the Church, as no part ought to be bound in spiritual matters without its own consent; in the same way that no person can be taxed without being represented in Parliament. These principles, laid down by all canonists and jurists before the two countries and churches were united, are no less applicable to the present condition of the Church, when especially the Irish Synod is a body whose existence is recognised by the Common and Statute Law.

The matter, however, does not rest upon mere inference and argument, however cogent. There is irrefragable evidence that, in the negotiations for the Union, the Irish Parliament advanced the claim of the Irish branch to representation in the general Synods of the United Church; and it would appear, that although, in compliance with the wish of the British Parliament, an express provision for that purpose in the formal contract was withdrawn, the good faith of the Crown and United Parliament was relied upon for giving it effect after more mature deliberation. On the 2nd of April, 1800, the original resolutions of the Irish Parliament, respecting the proposed Union, were communicated to each House of the British Parliament. One of the resolutions was as follows: —

"Resolved, that, for the same purpose, it would be fit to propose, as the 5th Article of the Union, that the Churches of that part of Great Britain called England, and of Ireland, shall be united into one Church; and that, when his Majesty shall sum-

[1] Vide Pearce on Convocations, 53.

mon a Convocation, the Archbishops, Bishops, and Clergy of the several provinces in Ireland, shall be respectively summoned to and sit in the Convocation of the United Church, in the like manner, and subject to the same regulations as to election and qualification, as are at present by law established with respect to the like orders of the Church of England; and that the doctrine, worship, discipline, and government of the said United Church shall be preserved as now by law established for the Church of England, saving to the Church of Ireland all the rights, privileges, and jurisdictions now thereunto belonging; and that the doctrine, &c. . . . . of the Church of Scotland," &c.[1]

On 21st April, when the resolutions were under the consideration of the House of Commons, Mr. Pitt said:—

"The next article relates to the continuance of the Church of Ireland, and of England, and of Scotland; upon which the articles differ in nothing from the articles which we ourselves have sent to Ireland, except under the head of a Convocation, to which, I apprehend, there can be no objection. I shall only say this, on so interesting a subject, that the prosperity of the Church of Ireland never can be permanent, unless it be a part of the Union to leave, as a guard, power to the United Parliament to make some provision in this respect, as a fence beyond any act of their own that can at present be agreed on. It may be proper to leave to Parliament an opportunity of considering what may be fit to be done for his Majesty's [Roman] Catholic subjects, without seeking at present any rule to govern the Protestant establishment, or to make any provision upon that subject."[2]

Afterwards, May 5th, in Committee upon the 5th Article,

"Mr. Chancellor Pitt said, it was judged better to omit the insertion of any provisional article respecting the Convocation, till the Union actually took place; more particularly as his Majesty, as the head of both Churches, had the power to call such a Convocation when he pleased."[3]

The 5th Article, accordingly, was amended in the form given in a preceding page, and in that form was accepted by the Irish Parliament.

[1] 11 Parliamentary Register, 164.
[2] Ibid. 274. Pitt's Speeches, vol. iv. p. 82.
[3] 11 Parl. Reg. 512.

IV. Our fourth and last proposition is, that, hitherto, the Union of the Churches has been practically disregarded, greatly to the public detriment.

In the first place, Her Majesty's writ is never sent to the metropolitans of Ireland, summoning them and their suffragan bishops and clergy to Convocation, as it is sent to the English metropolitans, at the commencement of each Parliament. Such has been the practice ever since the Union. The omission may have arisen from slovenliness or oversight; and this appears probable when we bear in mind that during the whole of that period the assembling of the English provinces has been merely *pro formâ*. Moreover, in designating the Church, the old form of writ is maintained, though inapplicable to the present state of things. After the usual greeting to the Archbishop, it runs: "By reason of certain difficult and urgent affairs concerning us, the security and defence of the *Church of England*," — a body no longer existing! — "and the peace and tranquillity, public good, and defence of our kingdom," (*our United Kingdom*, we presume, not *our kingdom of England*,) "and our subjects of the same, We command you," &c.[1]

The phrase we have just noticed, "Church of England," is one naturally enough employed in common parlance. The use of it, however, in official documents, and on solemn occasions is reprehensible, as tending to encourage and perpetuate a feeling, already too common, that the Church in England stands upon a different footing from that in Ireland, and ought to be treated differently; — in other words, that effect ought not to be given to the 5th Article of the Union. Mr. Stephens notices the practice in question, and he cites a passage from Bishop Jebb's speech in the House of Lords, in the year 1824, relating to the Irish Church establishment, which is too important to be curtailed.

"We have lately," said his Lordship, "heard frequent mention made of the Church of Ireland, and the Church of England. I

[1] It may be here remarked that in some of the recent Royal proclamations, the correct term, namely, "the United Church of England and Ireland," is used.

have myself heard it mentioned in various companies, and I have read the doctrine in several publications, that the Church of England stands on a different footing from the Church of Ireland; and the one Church ought to be treated differently from the other. Now, against this doctrine, and against any conclusion deducible from it, I must solemnly protest. I know not, the law knows not, of any Church of England; I know not, the law knows not, of any Church of Ireland. I know, and the law knows, but of ONE reformed Episcopal Church within this realm — *the United Church of England and Ireland.* The English portion, and the Irish portion, at the period of the Union, were bound together indissolubly, and for ever. They are one in doctrine, one in discipline, one in government, one in worship. Each portion, therefore, must be treated as the other. I do not, indeed, say that there may not be circumstantial, modal differences, precisely as there are varieties of arrangement within the English branch itself; as, for example, the manner of raising and collecting the Church revenue in London, may differ from the manner of raising and collecting the Church revenue in York. . . . . But against any substantial, any essential, any vital differences of treatment, I most solemnly protest; and I do not hesitate to declare such a difference morally and constitutionally impossible. I would exhort those who love and venerate our constitution, both in Church and State, to consider what we have at stake — the integrity of one United Kingdom, and the Protestant faith of this Protestant empire. If one portion of the Church suffer, all must suffer with it. The Church *in* England and the Church *in* Ireland have no separate interests, have no separate being; THEY MUST STAND OR FALL TOGETHER. The United Church of England and Ireland is *one* and *indivisible.* It was made so by solemn national compact, in the Act of Union. This identity constitutes the fundamental article of union; we might as properly speak of two Houses of Commons, two Houses of Peers, two Sovereigns, two complete Legislatures, the one for England, the other for Ireland, as speak of two distinct Churches. The national faith of both countries is pledged equally to maintain one Church, one King, one House of Commons, one House of Lords. If Parliament, therefore, were to subvert or remodel our Church establishment in Ireland, it would break the Union; and if it break the Union, it will enact its own destruction; it will enact a revolution; and of such a revolution, the fruit would be nothing else than anarchy and public ruin."[1]

[1] 1 Steph. Ir. Pr. B. cxxvii. n.

It was with a similar feeling, doubtless, that "names are things," and as marking their sense of the want of a more cordial co-operation habitually between the English and the Irish prelates of the Establishment, that the latter, the other day, unanimously addressed to the Archbishop of Canterbury the following important remonstrance, arising out of an address to the Queen from the English prelates, respecting the recent Papal aggression.

"TO HIS GRACE THE LORD ARCHBISHOP OF CANTERBURY.

"We, the undersigned Archbishops and Bishops of the United Church of England and Ireland, have seen in the public prints a document entitled 'An Humble Address of the Archbishops and Bishops of the Church of England,' and commencing with the following words:—'May it please your Majesty, we, the Archbishops and undersigned Bishops of the Church of England, approach your Majesty,' &c. It is with much regret, and not without apprehension, that we have observed the title by which your Grace and the Archbishop of York, together with the suffragan Bishops of the two provinces under your jurisdiction, have designated yourselves in addressing our Sovereign — a title which, we beg permission to say, is unknown to the law of the land, and which imports a virtual denial of the fifth article of Union between England and Ireland. Your Grace is aware that by the statute 39 and 40 George 3. c. 67. it is enacted, 'that the Churches of England and Ireland, as now by law established, be united into one Protestant Episcopal Church, to be called "the United Church of England and Ireland." The title-page of our Book of Common Prayer, and the Form of ordaining Priests, bear their solemn testimony to the incorporation of the two Churches into one, and to the designation by which that one Church is to be known.

"We have painfully felt that of late years, as well in legislating on ecclesiastical affairs as on many public occasions, a disposition has been manifested to regard the Irish provinces of the United Church as if they did not form an integral portion of the one Church of the nation. We are conscious that the Irish branch of the Church is peculiarly exposed to the attacks of its enemies; and we are, on that account, the more apprehensive of any step being taken which has a tendency, even in appearance, to dissociate our provinces and bishoprics from that great community with which it is our happiness, and we hope our safety, to be identified. We, therefore, not unnaturally fear the effect which may be produced

by a movement on the part of our English brethren against a common adversary, in which they have not only acted without any concert or communication with us, but have styled themselves by a name which would seem to intimate that they are prelates of a separate Church from ours, and wish to appear so before Her Majesty.

"We beg to assure your Grace that, in submitting this statement to your consideration, we are not actuated by wounded feeling of disappointment or dissatisfaction, but we deem that we owe it to the Church in which we bear office to guard, as far as in our power, against a separation being made between the component parts of the National Church, which were most solemnly and authoritatively united together into one. We confidently hope that the form of designation employed in your address was adopted inadvertently, and not from a design to disclaim a connexion with the provinces of Armagh and Dublin. And we trust that we may reckon on having the aid, the sympathy, and the prayers of the Archbishops and Bishops of the provinces of Canterbury and York in whatever difficulties and dangers may yet await our portion of the Church.

"We would respectfully request of your Grace to communicate this expression of our sentiments to the several prelates who signed the address to Her Majesty.

"John G. Armagh.
"Richard Dublin.
"Thomas S. Meath.
"J. Kilmore, Elphin, and Ardagh.
"R. Derry and Raphoe.
"Ludlow Killaloe, and Clonfert.
"Thomas Tuam, &c.
"J. T. Ossory and Ferns.
"Robert Cashel, &c.
"James Cork and Cloyne.
"Robert Down and Connor.
"William Limerick, Ardfert, and Aghadoe."[1]

[1] We subjoin the answer of the Archbishop of Canterbury.

"Addington, Croydon, Dec. 31. 1850.

"My Lord Archbishop,—I beg to acknowledge the receipt of a letter signed by your Grace, by the Archbishop of Dublin, and all the Irish bishops, referring to the recent address of the English Bench to Her Majesty, in which they were styled 'the archbishops and bishops of the Church of England.'

Not being in the councils of the Most Rev. and Right Rev. Remonstrants, we cannot name for certain those occasions upon which the want of unity complained of was more especially experienced. But we can readily conjecture that the suppression of ten bishopricks in 1833, and the various measures by which, under one pretext or another, the emoluments of the parochial clergy in Ireland have been curtailed — reduced, indeed, in too many instances, to a miserable pittance — were uppermost in their Lordships' minds: occasions upon which the feeble opposition offered by the English bench in general — with noble exceptions, doubtless — amounted to a virtual surrender. Acts of Parliament, it is true, cannot compel the dispositions of individuals. But the habitual neglect of the forms, joined to an equal forgetfulness of the

"I am anxious to assure your Grace, and my other right rev. brethren in Ireland, that this designation did not originate in any desire to represent ourselves as a separate body, but was employed solely because, in the present instance, 'the movement of the common adversary' was immediately directed against ourselves.

"It did not appear to any of the bishops whom I had the opportunity of consulting, that we could properly invite the Irish bishops to complain of an aggression which only affected the Church in England. At the same time, I am ready, for my own part, to acknowledge that the document would have been more correctly worded, if it had been written in the name of the English archbishops and bishops of the United Church of England and Ireland. It would have been better to have indicted an inharmonious sentence than to have given ground for the apprehensions expressed in your Grace's letter.

"I will take an early opportunity of communicating this letter to my episcopal brethren, who at present are dispersed in their various dioceses. But I can venture to say in their behalf, that we all consider the Irish branch of the United Church to be so closely identified with our own, that if one member suffers, the other cannot fail to suffer with it, and that in all cases where co-operation is desirable or practicable, we shall be ready to act with your Grace and the other Irish prelates, as an united body.

"I remain, my Lord Archbishop,

"Your Grace's faithful servant,

"J. B. Cantuar.

"His Grace the Archbishop of Armagh."

Whilst these sheets are passing through the press, an Address to the Queen upon the Papal aggression, from "the Archbishops and Bishops of the Irish provinces and bishopries of the United Church of England and Ireland," has appeared in the public prints (see *Times*, Jan. 23. 1851). The document is too long for insertion, but it insists upon the same points which are urged in the remonstrance to the Archbishop of Canterbury, and it also corroborates many of the views put forth in the present article.

substance, of the great international compact, has mainly engendered the unwholesome habit of regarding the two branches of the Church apart from each other. This will the more readily appear, when we draw attention to another point adverted to by Mr. Stephens, involving — an *invidious* distinction, we were going to say, between the inhabitants of the two islands; only we do not choose to put it on so low a ground — a distinction, however, we will say, disastrous to both countries, and as broad and deep as the channel which flows between them.

Mr. Stephens says:—

"Irishmen seeking clerical employment in England have been discouraged to an extent, and in a mode inconsistent with the spirit of the Act of Union between England and Ireland. . . . . .

"The rule of exclusion has been rigidly acted upon in regard to the higher benefices in England of the United Church. The gross injustice of this proceeding is rendered the more offensive by the fact, that the honours and emoluments of the Irish branch of the United Church are freely thrown open to clergymen ordained in England. Thus, of the great prizes of the Irish branch of the Church, Armagh stands first, both in dignity and emolument. This see has been occupied exclusively by men from the English universities ever since the year 1702, a period of 145 years. For the first 120 years of that period the Primates, eight in number, were all Englishmen by birth as well as by education. The present primate, who has held the office for twenty-five years, is an Irishman, but was educated at Oxford."[1]

He then enters into an analysis of the appointments to the next two "great prizes," Dublin and Derry, for the last century and half, showing how the British lion's share of each was adjusted with his less ravenous neighbour. Mr. Stephens afterwards continues: —

"The other sees do not, in general, present so great a preponderance of Englishmen; but still they exhibit a large amount of church patronage abstracted from Irishmen in order to be bestowed upon English churchmen, generally speaking of very inferior character as respects the qualifications which must ever be deemed essential for the office of a Christian Bishop.

[1] Ir. Pr. B. cxxxii. n.

[2] It has since been filled up by the appointment of an Englishman.

"In some late appointments the principle of nominating Irishmen appears to have been acted upon, but notwithstanding this, at the present moment the Irish Episcopal Bench is occupied by twelve prelates (Limerick being now vacant)[2], of whom six are Dublin men. The remaining six (including both the archbishops) have received their education at the English universities. Of these six one is an Englishman.

"On the other hand, not even a solitary instance exists of an Irishman advanced to an English bishopric since the Reformation. Promotions to the see of Sodor and Man cannot be justly accounted an exception. Probably the same may be affirmed with respect to inferior English dignities, such as deaneries and archdeaconries. The Union has caused no difference in this respect.

"With regard to translations, there have been, since the Reformation, only six from Irish to English sees, the prelates translated being all Englishmen."

The last of those translations occurred in 1692.

It is not, however, with appointments previous to the Union that we are now concerned. We have before us a list of all the prelates of the United Church appointed since the Union, — 103 in number. Of these 40 have been appointed to Irish sees, and they include 31 Irish and 9 Englishmen. In the provinces of Canterbury and York, there have been 63 appointments, all of Englishmen, with one exception. Dr. Ward, an Irishman, got half-way across the Channel, to the Isle of Man; but (rare occurrence!) he was suffered to die in the seat once occupied by the illustrious Wilson (himself a graduate of Dublin), although 14 opportunities occurred of translation to an English bishopric.

This system must indeed appear to any candid mind "inconsistent with the spirit of the Act of Union." But let us see how it further disappoints the rational expectations of Irish churchmen, in accordance with the pledges held out to them by the Government at the time of the Union. In advocating the measure in 1799, Mr. Pitt said: — "What is the remedy that reason and policy point out? It is to identify them [the Irish people] with us; it is to make them a part of the same community, by giving a full share of those accumulated blessings which are diffused throughout

Great Britain; it is, in a word, by giving them a full participation of the wealth, the power, and the stability, of the British empire. . . . She [Ireland] would see the avenue to honours, to distinctions, to exalted situations in the general seat of empire, opened to all those whose abilities and talents enable them to indulge an honourable and laudable ambition."[1] Again, in April 1800, Mr. Pitt said: —

"In the union of a great nation with a less, we must feel that we ought not to be influenced by any selfish policy, that we ought not to be actuated by any narrow views of partial advantage. We must refute by our conduct (what indeed we might have hoped that our terms had already refuted, if what fell from an honourable gentleman [Mr. Jones] this day did not unfortunately prove that a degree of unaccountable prejudice still existed), the idea that we have any other object in view than that of promoting the mutual advantage of both kingdoms. . . . . But it is not merely a sentiment of generosity and magnanimity which influences her [England's] conduct: in thus striking a balance between two nations, justice requires that the greater share of advantage should fall to the less powerful one." [2]

It is perfectly clear that the solemn pledges, thus declared, have not been redeemed. Far otherwise, "The avenue to exalted situations in the general seat of empire," has been effectually—not "opened," but—*closed* to many "whose abilities and talents" might have "enabled them to indulge an honourable and laudable ambition;" as effectually closed, indeed, since, as before the Union. Of the several Irish divines of European reputation that have appeared during the present century, not one could, at any time down to the present day, have rationally indulged the most distant aspiration to Canterbury or London, — not even to Llandaff. "In striking the balance between the two nations, the greater share of advantage has" NOT "fallen to the less powerful." "Do not," said Dr. Johnson to an Irishman, "make an union with us, Sir. We should unite with you only to rob you. We should have robbed the Scotch, if they had had anything of which we could have robbed them."

[1] 34 Parl. Hist. 269. 274. [2] 11 Parl. Reg. 265.

"Neither the letter," says Mr. S., "nor the spirit of the Act of Union has been practically recognised. Had it been otherwise; had learning and high character been recommendations for the episcopal bench, many eminent men who had graduated in Ireland would have been selected to fill some of the vacant bishoprics in England; and it would have very much tended to cement the two countries, had not only English clergymen been occasionally made Irish bishops, but Irish clergymen occasionally made English bishops. So far was this from being the case, that, as Bishop Jebb observes: 'For ages prior to the legislative union of the countries, it was the English plan to govern Ireland by a system of exclusion. Primate Boulter's Letters (a book which should, in the hands of Irish governments, be a perpetual warning,) will tell you that, in his days, as it had been from the first, the crime of being a born Irishman was an insurmountable obstacle to high advancement, either in the Church or at the Bar. On every successive vacancy, in either Bench, his continual cry was, "Send over an Englishman, or you cannot hold the country." Nor did this rule of Helotism cease with the administration of Archbishop Boulter.' (Bishop Jebb's Life, vol. ii. p. 478., ed. Lond. 1836.)

"Bishop Jebb also states: 'Since the year 1822, while one or two creditable appointments have been made on other grounds, and in connection with the University, not a single appointment high or low, has taken place in Ireland, on that ground, which, with every wise government, and in every well-ordered church establishment, ought to stand first, — the ground of theological learning and attainments. In one word, the qualification which has, in England, long stood first, and always stood high, has absolutely stood below zero in Ireland, . . . and has become, if possible, less than a negative quality. Such, I must repeat, has been, and such continues to be, the neglect of what ought to be this paramount claim, ... that, for all the appointments made by the Crown, since the period above alluded to, the Government have not so much to show, in justification of their choice of men, as even a single published sermon of common respectability!'" (Bishop Jebb's Life, vol. ii. p. 481.)[1]

One short fact, mentioned by Mr. Stephens, (Introd. vol. i. p. cxxxv.) will illustrate the preceding observations. It will astonish our English readers; but WE can assure them of its

[1] 1 Steph. Ir. Pr. B. Introd. cxxix. cxxxi.

truth. "Within the last twenty-six years, a man, after having been elevated to the Irish episcopal bench, said, that *the Greek language was very perplexing as it was read from right to left!*"

But the question of the union of the churches is not an Irish question: it is an imperial question. We are not solicitous to pamper the "honourable and laudable *ambition*" of an Irish party, or the sordid selfishness of an English party. What we want to see, is the letter and the spirit of the Acts of Union faithfully carried into effect. We say *a party;* because we are convinced that the proverbial probity of Englishmen,—their proverbial love of fair play,—is no vain boast. We sincerely believe that, generally, the learned and pious prelates of England will hail with joy the advent to English sees of Irishmen, equally learned and pious with themselves, well qualified by experience to enlighten their brethren in England upon all that relates to Ireland, and prepared to receive in return, and to transmit to their own native country, the ways, the habits, the thoughts and the feelings of England; to reciprocate with their English brethren who may cross the Channel mutual offices of lasting unity and good will; and thus to promote the assimilation and blending of the two countries in a way hitherto untried — but in strict accordance with the requisitions of the UNION.

In the consideration of this question, the recent Papal Aggression has almost necessarily come before us.

The open assumption, by Dr. Wiseman, of the title of "Archbishop of Westminster," with plenary ecclesiastical jurisdiction over certain counties; and the parcelling out of England into dioceses, to which Roman Catholic Bishops have been appointed, each with like jurisdiction within and over his diocese, and with titles derived from places within the districts assigned to them respectively—all under the professed authority of a Bull or Rescript from the Pope — has raised a commotion throughout the length and breadth of the land, unparalleled since the Revolution of 1688. The offences involved in these proceedings appear to us to be as follows: —

1, An offence against stat. 1 Eliz. c. 1. ss. 16, 27.

Sect. 16. enacts that no foreign prince, person, prelate, state, or potentate, spiritual or temporal, shall at any time use, enjoy, or exercise any manner of power, jurisdiction, superiority, authority, pre-eminence, or privilege, spiritual or ecclesiastical, within the realm. Sect. 27. enacts that if any person shall by writing, printing, teaching, preaching, express words, deed, or act, advisedly, maliciously, and directly, affirm, hold, stand with, set forth, maintain, or defend, the authority, pre-eminence, power, or jurisdiction, spiritual or ecclesiastical, of any foreign prince, &c., whatsoever, heretofore claimed, used, or usurped within this realm; or shall advisedly, &c., put in use, or execute anything for the extolling, advancement, setting forth, maintenance, or defence, of any such pretended or usurped jurisdiction, &c., then, for the first offence, he shall forfeit all his goods and chattels, real and personal. By sect. 29. a second offence involves the penalties of præmunire: and, by sect. 30. a third offence involves those of high treason. By 9 & 10 Vict. c. 59. the *penalties* only of the preceding statute are repealed, but it is provided that, in all other respects, the law shall continue the same. Consequently, the offences remain as statutory offences, but without any *statutory* penalty annexed to them. They are punishable, however, *at common law*, by fine or imprisonment, as misdemeanours. See Russell on Crimes (3rd ed.) vol. i. p. 49., and the authorities there cited.

2. An offence against stat. 13 Eliz. c. 2. sect. 3., which enacts "that if any person shall obtain or get, from the Bishop of Rome, any manner of bull, writing, or instrument, written or printed, containing any thing, matter, or cause whatsoever, or shall publish, or by any ways or means put in ure, any such bull, writing or instrument; that then all and every such act and acts, offence and offences, shall be deemed and adjudged high treason." The *penalties*, likewise, of this statute are repealed by the above-cited statute of Victoria, saving the offences, which, in like manner, are now punishable at common law, as misdemeanours.

The view we have thus taken of the law is supported by the high authority of Sir Edward Sugden, who, at a meeting of the County of Surrey held at Epsom on the 17th of

December last, for the purpose of addressing the Queen, expressed an opinion substantially coinciding with ours.

The Roman Catholic Relief Act (10 Geo. 4. c. 7. sect. 24.) reciting "that the Protestant Episcopal Church of England and Ireland, and the doctrine, discipline, and government thereof, and likewise the Protestant Presbyterian Church of Scotland, and the doctrine, discipline, and government thereof, are, by the respective Acts of Union of England and Scotland, and of Great Britain and Ireland, established permanently and inviolably; and that the right and title of archbishops to their respective provinces, of bishops to their sees, and of deans to their deaneries, as well in England as in Ireland, have been settled and established by law," enacts "that if any person other than the person thereunto authorised by law, shall assume or use the name, style, or title of Archbishop of any province, Bishop of any bishopric, or Dean of any deanery in England or Ireland, he shall for every such offence forfeit the sum of one hundred pounds." Doubts have been entertained whether, to constitute an offence within this statute, the title assumed must not be the title of one of the existing provinces, sees, or deaneries. In order to remove such doubts, it might be expedient to pass a declaratory statute, making it an offence to assume an ecclesiastical title derived from any place, though not the seat of an archbishop, bishop, or dean. It may also become a subject of consideration, whether the common-law penalties for the offences falling within the provisions of the statutes of Elizabeth, above cited, are sufficient to meet the exigency of a case like the present.

ART. IX.—AN INTERNATIONAL COMMERCIAL CODE.

Commercial Law. Its Principles and Administration; or the Mercantile Law of Great Britain compared with the Codes and Laws of Commerce of other Countries. By LEONI LEVI. Vol. I. Benning & Co., 1850.

THIS work is highly creditable to its compiler. It follows to a considerable extent the valuable *Concordance entre les*

Codes de Commerce Etrangers et le Code de Commerce Français of M. St. Joseph, but it contains much additional matter. It shows how much may be effected by the energy and industry of one individual, and is altogether a production of which no government need be ashamed. Its object is sufficiently explained by the Title, but it is proper to add that the provisions of all the existing Codes on the several subjects contained in this volume are placed in parallel columns and where necessary translated. We have here collected together, collated, and carefully arranged the materials for forming a Complete Commercial Code, and having undertaken and partly completed this great labour, Mr. Levi, with that foresight and energy which obviously distinguish him, next considers what can be best effected with these materials, and he makes a very interesting proposal with respect to an International Code. He thinks that a fitting opportunity may be found for bringing this forward in the approaching Spring, when so large an assemblage of foreigners will be collected in London, on account of the Great Exhibition. He has thus addressed Prince Albert on this subject:—

"Jurisprudence has made rapid advancement in every country; an advancement directed everywhere in conformity with the established laws of other nations. Commercial legislation, in its onward course, has manifested in especial degree a tendency to an equalisation of general principles. To foster such a development, and to lay the basis for the universal adoption of those great fundamental laws which regulate commercial intercourse, deserve the most strenuous efforts.

"To your Royal Highness, who has conceived the noble idea of centralising mind and matter, from all countries, that the riches of nature may be displayed, the skill of art appreciated, and the depth of intellect developed, I venture to propose the formation of what, it is generally acknowledged, would be an invaluable benefit to this and to all nations—

"A NATIONAL AND INTERNATIONAL CODE OF COMMERCE AMONG ALL CIVILISED COUNTRIES.

"To realise this universal scheme, deputations should be invited to the metropolis at the time of the Exhibition (consisting of a banker, a merchant, and a jurist from the metropolis and seaports

of each country), with a view to consider the expediency of forming such a national and international code, when the various headings to be included in the Code, such as the Law on Partnerships, Factors, Contracts, Insurance, Bills of Exchange, Shipping, Bankruptcies, and Administration of Justice, &c. &c. might be determined upon.

"Such deputies, on their return to their own countries, should institute prize essays on the state of commercial law; one with respect to the requirements of commerce, another with regard to the principles of jurisprudence.

"The following year the deputies should resume their task, and each exhibit to the general meeting such prize essays. Then divide themselves into committees to consider such headings respectively, and afterwards conjointly work out the great whole.

"The result of their labour should be sent for the approval of their respective governments, and become the mercantile law of nations within one year from the period of its entire accomplishment.

"Every three years afterwards similar meetings should be held in every metropolis of the countries consenting to it, by rotation, to take into consideration the wants experienced within the period, the defects found in the working of any principle, and the creation of any new relations demanding new regulations.

"If, in the course of such periods, any nation should find it requisite to alter some of the laws, it may do so temporarily, giving notice to other countries, and reserving the permanent adoption of such alteration to the general meeting.

"The practicability of such a scheme is exemplified in the recent enactment of the law on Bills of Exchange for all Germany, to replace the numerous laws and ordinances on the subject which had previously existed in the several independent states. Prussia, Hungary, Wurtemburg, Anhalt-Coethen, Austria, Baden, Bavaria, Bremen, Brunswick, Frankfort, Hamburgh, Hanover, Hesse-Electorate, Lubeck, Nassau, Saxony, Altemburgh, Saxe-Coburg-Gotha, Saxe-Weimar, Schwarzburgh, had all their distinct ordinance on bills of exchange. At a congress held at Leipzig in 1848, consisting of bankers and lawyers from all Germany, a general law was established which came into operation in 1849."

This proposal has been very kindly entertained by Prince Albert, and we are enabled to lay before our readers a portion of the reply which his Royal Highness directed Colonel Grey to give to this application.

"His Royal Highness had always hoped that the effect of the proposed Exhibition would not be merely the gratification of passing curiosity, but that the impression which it was calculated to make in beholders, and the reflections to which it would give rise, would be such as to confer a lasting benefit on the world.

"His Royal Highness is convinced that the true interests of all nations are in fact identical, and that it must be to the advantage of all to assist and advance the prosperity of each other; and it will be a source of sincere gratification to His Royal Highness if the Exhibition shall be found to afford, as His Royal Highness believes it will, the means of giving such mutual assistance.

"The subject of your Work can hardly fail on such an occasion to come under consideration and discussion. It cannot be doubted that uniformity in the laws by which commerce is regulated in different countries would be, if it could be obtained, of immense advantage to commerce generally.

"The only question would be as to the mode of attaining this uniformity. His Royal Highness could not give his support to a plan such as that which you suggest, or to any plan that would trench in any degree upon the province of the Executive, or the Legislature, of the countries to be affected by it. It must be left to the different Governments themselves, to effect such changes in their commercial laws as they may think desirable; and in any measures which they may think it right to introduce for this purpose, they will no doubt be materially influenced by public opinion."

This proposal deserves great consideration, and we have no doubt that much good will result from a meeting of jurists and merchants on this subject. Probably it is on the subject of Partnership that most interest will be felt. We find, on the examination of that portion of Mr. Levi's work, that Great Britain stands alone in insisting on unrestricted liability as the general rule of law, and we believe that an attempt will be made in the ensuing session to introduce into this country that form of Partnership which is best known as Partnership *en commandite*. Much evidence on the subject was taken last session before Mr. Slaney's Committee on the Savings of the Working Classes, which we may have occasion to examine on a future occasion. To any one interested in this subject

we cannot do better than refer to Mr. Levi's useful work, which they will find a perfect storehouse of valuable information.

ART. X. — THE GREAT SEAL.

THE belief has of late been gaining ground, that some important changes in our Judicial System are in the contemplation of the Government; and certainly there has been no want of discussion on this subject during the last few months. Those who have borne a part in it, at least through the medium of the Newspapers, have been, generally speaking, acquainted with the subject as far as the pressure of the existing evils is concerned; but they have in many cases been unaware of the difficulties attending the remedies proposed in any considerable measure; and some of them have been apparently biassed by professional prejudices, possibly connected with their individual concerns, as undoubtedly others of a far less respectable description have been affected by their own case as suitors; and attempts to raise money in aid of Law Reform seem to indicate its having become with certain classes a speculation. The gross ignorance of facts as well as of law, which has in some instances been displayed, and the unreflecting violence which has been also exhibited, call upon all real friends to the Amendment of the Law to take care that this most important subject — we might perhaps, without exaggeration say — most important of all subjects on which the Legislature can be called upon to act, suffers no detriment from the "zeal without knowledge," which is occasionally to be observed in the discussion.

We do not propose at present to enter fully into the consideration of the whole subject. But we think it necessary to lay a few facts, not sufficiently attended to, before our readers touching the topic now most prominently brought forward in the rumours of projected change to which we have referred — the alteration in the duties attached to the Great Seal. — This resolves itself into two branches — the supposed project of newly arranging the Lord Chancellor's duties in his

own Court: and the project likewise supposed to be entertained of a change in the Appellate Jurisdiction, that is, the jurisdiction now exercised by the House of Lords.

I. That an accumulation of Equity business has created a considerable arrear, is undeniable. But two considerations must be carefully kept in view when we are dealing with this matter. The arrear looks very much heavier than it really is, and it is not necessarily a *permanent* obstruction. Those who say, with the author of one tract (Tracts for the Times, New Series, No. IV.), that there are 883 causes now standing for hearing,—a statement placed at the head of his title-page,—ought to have inquired how many of these are *claims* under the late orders, and exceptions, &c. under Mr. Turner's Act; because if the numbers belonging to these classes be much greater, it is manifest that they are also much more easily and quickly disposed of than causes in the ordinary sense of the word. But this is not all: how many of these causes are under the Winding up Acts? This head of business is of necessity temporary, for which, until the whole list be sifted carefully, the total numbers really tell nothing.[1] Again, it is by many very competent persons believed that the real arrear is imputable to the temporary accident of Lord Cottenham's illness, and two of the three Vice-Chancellors being likewise disabled by the same cause, during part of the time, as well as the Master of the Rolls though in a lesser degree. We cannot refer to these unfortunate circumstances without expressing the opinion, held by us in common with the whole profession, of the great exertions made by the Vice-Chancellor, Knight Bruce, on whom necessarily fell the heaviest load during the illness of his learned brethen, and whose ability equalled his industry in performing that important duty. The Lord Chancellor, too, owing to the same pressure, gave up the whole of his long vacation, and slaved as incessantly during that period of other men's repose, as at any other period of the judicial year—a self-sacrifice altogether forgotten, as is the talent which he

[1] The printed list for Hilary Term, 1851, gives 924 matters before the four branches of the Court—of which 317 are claims. Before the Lord Chancellor there are 69 appeals; and we must add to these, about 30 appeal notices.

displayed, by those who have been assailing him as the cause of the existing obstructions, and as unable, during the first two months of his sitting in Court, to bring down an arrear which others have taken nearly a year to vanquish. We believe Lord Brougham, who has been somewhat invidiously referred to, on this subject, took from November 1830, to late in October 1831, before he disposed of the 140 odd appeals in Chancery, (the same number as that when Lord Truro took the Great Seal,) and the 110 odd in the House of Lords, — and this became practicable mainly owing to the accident of the Reform Bill keeping every one in town during the whole of the long vacation.

It is obvious that the details of the subject must be carefully gone into with a view to both the considerations which we have mentioned, before any safe opinion can be formed respecting the remedies proposed. For what could be more absurd than to frame a permanent measure and make a great change in our system, if it be true that the evil is of a temporary nature? But it is also very possible that some provision may be required of a far less considerable extent than those we hear so much talked of, and that such a provision may suffice to meet as much of the difficulty as is not temporary or accidental. For example, it is possible, that the place of third Vice-Chancellor now abolished, may be properly restored; and it must not be forgotten, that unless the business of the Court of Chancery is found to have increased enormously[1], the judicial force added within the last twenty years is such as should be able to cope with it. For besides the creation of two Vice-Chancellors, the Master of the Rolls has become an ordinary and regular Equity Judge, instead of sitting a few hours in the evening, and the Chancellor has been relieved from the heavy load of Bankruptcy, which used to occupy him entirely for nine or ten weeks in the year. If we compare the judicial force since 1830 with what it was at that time, we must allow it to be at least doubled, and compared with its amount before 1813, it is nearer four than three-fold, even allowing for the transfer

[1] The number of Bills filed during a period ending December, 1850, is nearly the same with the number filed during the same period ending December, 1849.

of Equity from the Exchequer. Our estimate herein proceeds upon the assumption that the office of third Vice-Chancellor shall be restored.

But suppose an arrangement is made by which the Lord Chancellor, relieved from political and parliamentary duties, becomes a mere chief judge in Equity; — rather say that instead of a Chancellor sitting in Equity, we have a new and superior Equity Judge, will a third Vice-Chancellor be required in that case? This is, however, the least part of the matter. How is the appeal to be arranged from the Rolls and the Vice-Chancellors? We see some not very reflecting persons say—"Nothing is more easy, for you have only to make the appeal lie from any one of the four Equity Judges to the other three." This of course supposes only two Vice-Chancellors; if there are three, then the appeal would be from one to three of the other four. But in either case this would imply the permanently shutting up, on the one supposition three out of four courts, on the other three out of five; because the advocates of this plan do not appear to have considered that there is one position not to be got rid of: the appeal business is quite sufficient to occupy one court, be it composed of a single judge as at present, or of three, as is proposed, daily during the whole judicial year. Therefore it is quite certain that this arrangement must at once reduce the judicial force, as far as original causes are concerned, one half, if there are three Vice-Chancellors, and two-thirds if there are only two. But then it is said, make more Vice-Chancellors, — How many more? If, independent of the new Appeal Court, three are required, you must, to keep the judicial force the same, have no less than five Vice-Chancellors, — that is, revive the place abolished on Sir J. Wigram's resignation, and add two more. We venture to submit that this is a matter requiring the most minute previous inquiry into all the facts relating to the arrears; and also that so great an addition to the number of the Judges may be open to serious objections. But we also would suggest that there is another difficulty in the way. It is the opinion of many that questions of Equity are less than others fitted for a Court composed of more than one. In this we are far from agreeing. But we also feel

that a newly formed Court of Appeal is little likely to have the same authority with the long-established one of the Lord Chancellor. If, too, the Chief Judge is intended to be of greater weight than the Vice-Chancellors, an appeal from him to them seems objectionable. Accordingly Lord Lyndhurst (see Lord Brougham's Letter to Lord Denman, p. 32.) has suggested that from the Chief Judge the appeal should only be to the House of Lords.—It is thought that the analogy of the Exchequer Chamber has misled many on this head. Now they do not erect anything like the two courts of law sitting in error from the third, when they give an appeal from one Equity judge to the others, because error is only for matter of law appearing on the record; and accordingly writs of error bear no proportion to appeals, which are on all matters—matters of fact, of practice, of law, of equity. Thus to take an instance, by way of example, the average number of causes heard in the House of Lords is about forty a year, — of these not four (three two-fifths) are writs of error. This, however, includes Scotland, and indeed it is not a fair estimate to show the difference of error and appeal; for we affirm that while the sittings in error do not occupy four weeks in the year, the appeals in Chancery are sufficient to occupy the Court nearly forty.

II. The other branch of the subject is, however, attended with much greater difficulty—we mean the reconstruction of the Chancellor's office. If he is no longer to be a judge in Equity, then, first, there will be no security for the person called to exercise his high powers both in Parliament, and Council, and especially entrusted with the most important of all patronage, the appointment of Judges, being a person well qualified for the office; and, secondly, there must be some new arrangements in the appellate jurisdiction of the Lords, because a judge will then preside who may be little fit to review the decisions of the Equity Courts. Accordingly, the projectors of the change are for greatly altering this High Court of Appeal, contending that it is at present of an anomalous construction. The great difficulty of constructing an Appeal Court was stated by us, in our last number, from the letter of Lord Brougham, who largely discusses that subject. But with a view to

the practical question — What is to be done? we ought to inquire whether the reconstruction of the Appellate Court is proposed on the ground of the new arrangement of the Chancellor's duties withdrawing him from original jurisdiction; or, because the existing Appeal Court is unsatisfactory. If there is a sufficient answer to the latter of these objections, it would be very necessary to consider how far a sufficient portion of original jurisdiction might not be preserved to the Great Seal, so as to prevent the necessity of a change in the constitution so very serious as interfering with the judicial functions of the House of Lords. If there is no sufficient answer, then the objection to the existing system may be allowed to prevail.

Now there are several considerations which may well make us at least pause over this objection, and these we shall briefly state.

First. There is wholly wanting the great argument for changing the structure of any court, namely, that the suitor is delayed, by its incompetency to transact the present amount of its proper business. There is no arrear whatever in the House of Lords; nor has there been for many years, unless for a few months of Lord Cottenham's illness; and at present all the causes entered before last Session were disposed of during that Session. Arrear therefore exists not.

Secondly. On one branch of the jurisdiction no objection ever has been raised. All appeals in matters of law — that is, all writs of error — are heard and determined with the assistance of the Judges; so that, substantially, the House is on the same footing, as regards law, with the French *Cour de Cassation*, save that its constitution is beyond all comparison more according to principle, and more safe for the suitor and for the law.

Thirdly. The appeals from Scotland form a very large proportion of the whole of the appeals in the Lords. Of 750 heard and determined in twenty years ending 1849, no less than 534 were Scotch, or nearly three in four (accurately 3 in $4\frac{1}{4}$). The yearly average is 37; of which nearly 27 are Scotch ($26\frac{7}{10}$), $3\frac{1}{5}$ Irish, and 7 English. Now, if there be any thing anomalous in this judicature, it assuredly is the Scotch portion, because these cases are heard by

English lawyers without any Scotch lawyer sitting among them, unless by a mere accident, — an accident that has not occurred above twice in a century and a half. Then how absurd is it to be driven to devise a new judicature with a view to the small fraction of English and Irish causes, when the great bulk of the whole mass is necessarily left unprovided for! We say necessarily, because no one has ever seriously proposed to have Scotch judges summoned as assessors, thereby shutting up the Court of Session half the judicial year — or to have Scotch lawyers added as assessors to the Lords' Judicature, thereby destroying all deference to its decisions, inasmuch as they would go forth to Scotland as the decisions of those assessors, — an objection equally fatal to any plan of having a small number of Scotch Judges summoned during the vacation of the Scotch Court, — the only other conceivable mode of dealing with the case, so as not to shut up the Court of Session while the appeals were heard. In short, the Scotch part of the case is wholly unmanageable, and it has been so found by all who have ever considered it, whether in London or in Edinburgh; so that the projected change in our judicial system, and in our constitution, is to be rested upon the supposed necessity of improving the decisions of the Lords upon about eight or ten appeals yearly.[1] We say upon our constitution as well as our judicial system; for, —

Fourthly. It is one of the largest measures that have ever been in contemplation, as far as regards the attributes of the House of Lords, possibly its existence, intimately connected as that is with its judicial character; and how this can remain to it if its judicature be vested in any other hands, we are at a loss to understand. That it may be suffered to call in the aid of Equity Judges as it does those of the Common Law, seems reasonable enough. That an addition may, with advantage, be made to the number of the Law Lords by a discreet and impartial exercise of the Royal Prerogative, is possible; though it must ever be borne in mind that peers made merely to sit as Judges in Appeal might fail to command

[1] If the years 1834 and 1848 be deducted, when the extraordinary number of forty-nine English and Irish appeals were heard, the average of the other eighteen years is only about seven.

the respect of the Courts below and of the profession, besides their deficiency as not sitting generally in the Courts of original jurisdiction; and if they are taken from the Judges actually on the bench, a door would be thus opened for making invidious distinctions between these dignitaries of the law, and thus breaking in upon the independence and the purity of the judicial character.

Fifthly. It may be suggested that there are too few English and Irish appeals, and that this is owing to the expense of the proceeding. That the delay can have no hand in this, we have already shown. Indeed, any arrear would have a tendency rather to increase the number of appeals. But if the expense creates any obstruction to the suitors availing themselves of the right of appeal, it is plain that there may be steps taken by the House of Lords to reduce the fees, if not to abolish them entirely, making due compensation to its officers, and that proper general orders respecting the costs and thus affecting the fees to counsel and solicitors, may also be devised.

Finally. We desire it may be distinctly understood that if the personal interest of the suitor,—that is, the due administration of justice — requires a change to be made in the Lords' jurisdiction, no other consideration ought to stand in the way of its adoption. But we maintain that the gravity of the projected measure renders a strict investigation of the alleged necessity the bounden duty of the Government and the Parliament also; and, above all, that no permanent change ought to be made with the view of relieving from a temporary pressure. In former times such obstructions were removed by putting the Great Seal in Commission. There are manifest objections to this course, unless it be only adopted for a very short time. But is there any reason why the same end may not be accomplished by appointing a temporary commission for hearing appeals in any matters within the Chancellor's jurisdiction, and leaving the Great Seal in his custody; so that he would only part with the whole or a great part of his judicial functions, while the remedy was applied to the evil. Two Equity and one Common Law Judge might thus act without material inconvenience to their respective Courts, as in most instances more than two of the three Commissioners need not sit. Other expedients of a temporary nature have

suggested themselves; but we give the above as an example, and in order to draw the reader's attention to this important view of the subject.

We confess there is one consideration which we find it difficult to prevent from entering into our minds in all these discussions. The tendency of every government is to spare itself trouble, and hence a great disposition to rely on the views of professional men, on the maxim of trusting men in matters connected with their own art. But it may happen that the legal profession is under a strong bias of interest; for no doubt the creation of new places, and the promotion of prosperous practitioners, is a source of direct gain to the candidates either for practice or preferment. But there is another tendency of all governments which we dread still more — their aptness to grasp at patronage; and if it be true — as there seems too much reason to suspect,—that the patronage of the Great Seal occasionally creates envy, who can tell how far the prospect of being admitted to share that patronage may dazzle mere politicians at the present moment! Now we believe that a greater mischief could not befall this country than the very least interference of its ministers with the most important by far of the Chancellor's functions — his appointment to judicial office. The Chancellor who can submit to the very least degree of this interference is wholly unworthy of his station. But so is the minister who would perpetrate the offence.

ART. XI. — EVIDENCE OF PARTIES.

AMONG the Reports of the Common Law Committee of the Law Amendment Society, one of the most interesting and important is that recommending the admission of the Evidence of Parties.[1] This Society has lately, with a view to the further discussion of this question, and the safe adoption of this alteration in the law, addressed a letter of inquiry to

[1] This Report has been printed by the New York Commissioners (Code of Civil Procedure, p. 718.), and was very instrumental to their coming to a similar conclusion. This Report has been printed, 8 L. R. p. 363.

all the County Court Judges; and we are now enabled to lay before our readers the answers of most of those learned persons. Our space obliges us slightly to abridge some of the answers, but we shall give every material statement. The precise question addressed to the Judges was this: — "In your judgment has the law which enables parties to be examined as witnesses in the County Courts worked well or ill?" We do not know that it is of much consequence to observe any particular order in giving these answers, and we have therefore adopted that given in the Law List. No returns have as yet been received (Jan. 21.) from the Judges the *numbers* of whose Courts have not been given. It will be seen how great a preponderance of opinions there is in favour of the admission of this kind of evidence, the only Judge positively against it being Mr. Palmer (No. 55.), while almost all the other learned gentlemen express themselves strongly in its favour.

(No. 1.)

"Newcastle-on-Tyne, Dec. 21. 1850.

"The law enabling parties to be examined as witnesses in the County Courts has worked well. In a large proportion of the *contested* cases in those Courts, there would be a failure of justice but for this practice. The additional temptation to perjury, and the occasional commission of it induced by the practice, are an evil greatly outweighed, in my judgment, by the increased facilities it affords for the general administration of justice among the community. The truth is generally discoverable through all the figments of a party under an open examination in Court, where his demeanour is scrutinised, and his statements are sifted. And, after all, suborned witnesses may always be found (where there is the profligate design), who will go equal lengths in the endeavour to pervert the truth with the most unscrupulous and reckless of parties: so that, in stopping the mouth of a dishonest party, you encourage the subornation of false witnesses, while you take from the honest party the best means of establishing his rights.

"GEO. H. WILKINSON."

(No. 2.)

"Durham, Dec. 17. 1850.

"In my judgment the law which enables parties to be examined as witnesses in the County Courts has worked well, and is of great

benefit. Without such a law very few small tradesmen could recover their debts, for they are not in the habit of employing shopmen or apprentices to conduct their business. Occasionally plaintiffs are guilty of falsehood and prevarication, but in general their testimony is supported by their trade books, or other written evidence made at the time of the dealing or transaction. At first a great many defendants came up and were guilty of gross perjury, but the number of cases in which the defendants are guilty of false swearing has considerably decreased. As far as the County Court is concerned, it is far better that the case should be proved by the plaintiff or his wife, supported by their trade-book or other written evidence, than entirely depend npon the alleged admission of the debt to some debt-collector, which was too often the case in the old County Court. When I state that the testimony of the plaintiff or his wife is supported by their trade-book or other written evidence, I do not mean that their trade-book is admitted as evidence, but merely that it is examined by the Court to ascertain whether the evidence of the party is corroborated by some entry or memorandum made at the time of the dealing or transaction. I should consider that the repeal of the law would be of great detriment to the trading community.

"HENRY STAPYLTON."

(No. 3.)

"Marton House, Dec. 24. 1850.

"In my judgment the law which allows parties to be examined as witnesses in the County Courts has worked well.

"It must be admitted by those most inimical to the introduction of this new principle of evidence that thousands of cases have come before the Courts, and the party has got his remedy which must have for ever been denied to him. I also am of opinion that the notion of perjury being so much more frequent is very erroneous.

"T. HASTINGS INGHAM."

(No. 4.)

"27. Sussex Gardens, Hyde Park.

"In my judgment it has worked well.

"Permit me to send you an extract from an address which I made at the first sitting of my Court after the act for extending the jurisdiction:—

"'It is but a prejudice of education which leads the lawyers to

an excessive dread of the perjury of parties. Of this the following statement will give the proof. I take a note in writing of every case which comes before the Court. From these notes I have ascertained that in the County Court at Preston during the year 1848, eleven hundred and eight defendants admitted that the plaintiffs had some cause of action at that time or previously; whilst only sixty-four absolutely denied that the plaintiff ever had any right at all. A thousand and seventy admitted the demand in various ways, thus —

" ' 163 by payment of the demand into court.

153 by admission made in open court.

270 by admission out of court, afterwards proved in court; such admission being made after action brought.

284 by not appearing at the hearing, which, in the Superior Courts, is considered an admission, and in the County Court may be more reasonably so considered, for there appearance costs nothing; but where, nevertheless, the plaintiff was still required to prove his case on oath in open court.

200 by admission made to the plaintiffs after action, but who proceeded no further in consequence of the defendants promising to pay without further proceedings, or stayed proceedings at the solicitation of the defendants on account of their poverty. Though this last number is not given with absolute precision, the error cannot be large.

38 defendants admitted part of the demand, and the plaintiffs accepted judgment for the part so admitted.

100 defendants disputed the plaintiffs' demand, on various grounds; as infancy, coverture, statute of limitations, discharge under insolvent act, payment, &c.

" ' In these 100 cases, the plaintiffs obtained judgment in 39 for their whole demand, and in 33 for part of their demand; the defendants obtained judgment in 28.

" ' In the cases of the 64 defendants who denied that the plaintiffs had any demand, the plaintiffs recovered judgment for their whole demands in 34; for part in 3; and the defendants recovered judgment in 27.

" ' Fearing that there might be something peculiar in the Preston Court, I proceeded to take a similar account of the cases in the County Court at Blackburn. The result so nearly coincides that that return need not be stated.

" ' These accounts show conclusively that in the County Courts truth is the general rule, and falsehood the exception; indeed, the rare exception. If such be the case with persons in the humblest walks of life, what is to be expected from those in the higher, where the loss of character is of so much greater importance, to say nothing of the effects of education or religion?'

" Permit me also to refer you to the inclosed extract from an address which I made at the time the County Court Act first came into operation, and superseded a Court of Requests of which I was Judge: —

" ' To attain greater certainty, a new principle is to be brought into action. It was a maxim in our Law Courts that no man should be heard as witness in a matter wherein he was himself interested; and so far have the lawyers carried this rule, and so little reliance have they had either on the honesty of mankind, or on their own ingenuity, that they have presumed that every man will perjure himself for the tithe of a farthing, and that neither Judge nor Jury can discover his falsehood. Though the soundness of this maxim has been for some time doubted, and the law has been very lately altered so as to allow interested witnesses to be heard, the general rule still prevails as to the parties and their wives. Now, in an action by a shopkeeper against his customer, there are usually four persons who know the truth better than any other persons in the world: they are the shopkeeper and his wife, and the customer and his wife. All these persons are, by the ordinary law, incapable of being examined: in these new Courts we are to hear them all, and give what credit we think really due to their statements.

" ' Having presided for near twenty years in a Court of Common Law of great practice, in which the parties could not be heard, and for five years in a Court of Requests, in which the parties may be heard, I must bear my testimony in favour of the latter mode of attaining truth; and I must do justice to the humble suitors of the Court at Blackburn for the honesty with which they generally admit the truth against their own interests.

" ' In fact, the power of examining the parties makes the attendance of other witnesses unnecessary in nearly all the cases. In the very few where witnesses are required, the Court has been in the habit of giving time to procure their attendance by adjourning the hearing until the next Court day. The saving of expense by this course has been very great.'

" JOHN ADDISON."

(No. 5.)

"Preston, Dec. 23. 1850.

"In my judgment the law which enables parties to be examined as witnesses in the County Courts has worked well.

"W. A. HULTON."

(No. 7.)

"Ross Cottage, Cheshire, Dec. 18. 1850.

"I have no hesitation in saying, that in my opinion, the power of examining plaintiff and defendant as witnesses in the County Court, has operated most beneficially. Nearly 40,000 causes have now passed through the several minute books on my circuit, and though I have been most vigilant in detecting perjury wherever I had reason to suspect it, I am happy to say that only in two instances have I had occasion to direct indictments for that odious crime; on the other hand I am satisfied that in at least one half of the cases which have come before the County Courts there would be a practical denial of justice, if parties, and their wives, were not admissible as witnesses. With a careful Judge, the advantage of the present systems in the County Courts is, I think, incalculable, the evil infinitesimal, if not altogether imaginary.

"JOHN WM. HARDEN."

(No. 8.)

"My answer is, that I think it works well. For the purposes of small debts, such a privilege is indispensable. But even for higher demands, and indeed in all cases, I apprehend that such a right would be beneficial. I think the examination of the parties promotes the object of every inquiry; namely, the ascertaining of the truth. It is true that the interest of the parties may be expected to induce them to swerve from the truth; and so it often does; but I think not nearly to the extent that might be anticipated. And even in those cases, I do not, in general, think it difficult, by a comparison and contrast of the statements of both parties, to ascertain where the truth lies. And I have repeatedly found that the evidence of the party in his own behalf has been of essential benefit to his opponent.

"ROBERT BRANDT."

(No. 9.)

"Victoria Park, Longsight, Manchester, Dec. 28. 1850.

"In my opinion the law which enables the parties to be examined as witnesses in the County Courts has worked well, and

I can see no reason why the same principle might not be adopted with advantage in all Courts. It is, I am aware, alleged by many whose views deserve the highest respect and consideration, that direct encouragement is thus given to perjury. But taking my own experience as a criterion, I am prepared to say, that, having regard to the amount of business transacted, this crime does not exist in the County Courts to a greater extent than in the Superior and other Courts to which the law in question does not apply.

"JOSEPH S. JOHN YATES."

(No. 10.)

"The Hallhouse, near Leigh, Lancashire, Dec. 31. 1850.

"The law has worked well.

"J. S. TURNER GREENE."

(No. 12.)

"County Court Office, Halifax, Dec. 18. 1850.

"The law has worked well; and it has been the means of recovering, in the circuit over which I preside, several thousand just debts, which otherwise would have been irrecoverable. And I will add, that I have not seen any greater disposition to exceed the line of truth by *parties* than is generally found amongst the class of witnesses who are indirectly interested, though admissible under the rules of the Superior Courts.

"JAMES STANSFELD."

(No. 13.)

"Wilsick, Doncaster, Jan. 11. 1851.

"The law has worked extremely well. In fact, if small debts and damages for small wrongs are to be recoverable at all, such a law is indispensable. Without it, half the actions now brought in the County Courts would be entirely without evidence to support hem; and in the other half an enormous amount of injustice would be done. It is a question whether it might not be desirable to enact that (subject to certain exceptions) debts under *5l.* should not be at all recoverable by action; but to effect this object by a sidewind, which would be the result of excluding the evidence of parties and their wives, would be most objectionable and unjust; and even were such an enactment as I have alluded to made as to the very small actions, I should still consider the admission of

parties as witnesses most desirable for the large number of causes that would remain.

"That the amount of perjury in the County Courts is very great cannot, I fear, be doubted, though it should be observed that the misstatements made arise more frequently from the extremely careless, hasty, and inconsiderate habits of answering of the lower orders, and from their slowness in understanding questions put to them, than from a deliberate intention to deceive. It appears to me also that the children, servants, and other connections of the person calling them, are just as ready to swear falsely as the parties themselves; and I very much doubt whether, in proportion to the number of witnesses sworn, there be a greater amount of wilful perjury committed in the County Courts than in those in which the testimony of parties is excluded. At all events, I am satisfied that when committed, it is more frequently discovered in the former Courts; and its consequences, therefore, are less mischievous; and that the system of examining parties tends very greatly to the eliciting of the truth.

"That it causes also an *immense saving of expense* must be obvious to any one who pays the slightest attention to the working of the Superior Courts, and sees what *great costs are incurred in bringing various witnesses* often from distant places to prove, perhaps indirectly and by presumptive evidence, facts which the plaintiff or defendant could most positively establish from his own positive knowledge, and which *the opposite party, if sworn, would not for a moment think of denying.* The above remarks have reference chiefly to the allowing parties to be sworn where they voluntarily offer themselves as witnesses. On the question of *compelling* them to be so at the instance of the opposite party, I have somewhat more of doubt, arising from a feeling (perhaps a prejudice) in favour of the old English rule, that no man shall be compelled to criminate himself; for the distinction between a criminal and a civil proceeding seems to me little more than technical. Practically, however, at least in the County Court, there is less difference than might at first sight be supposed between the allowing and compelling a party to a cause to be examined; for if one party swears to a fact, and the other, having the opportunity, declines to deny it upon oath, there can be little difficulty in presuming it, as against him, to be true.

"With reference to extending to all other Courts, criminal as well as civil, the law of the County Courts Act, enabling parties and their wives to be examined as witnesses, though the question is not expressly asked by the Society, I take the liberty of *offering*

an opinion in favour of it. The main, perhaps the only substantial, objection is the tendency to increase the already too slovenly and careless habits in transacting business of the great mass of mankind: but this evil would be far more than outweighed by the much greater certainty with which Courts of Justice would *arrive at the truth:* not to dwell too much on the undoubted advantage of such a practice in a pecuniary point of view. The objection that, receiving the evidence of parties would lead to the increase of perjury, appears a very futile one; for even admitting that such would be the result, which I doubt, it is merely the ordinary liability to abuse to which every law and usage is subject. A similar argument would apply against the institutions of property, because they lead to larceny, and to *those of marriage because* without them there *would be no adultery.* Indeed, such an argument, if pushed to its full length, would prove that no evidence whatever ought to be received, since, whenever a witness is heard there is a risk of his speaking falsely.

"The crime of perjury, however, and still more that of inconsiderate and careless mis-statement, are so common and so mischievous (the latter perhaps even more mischievous than the former) that some means more effectual than exist at present ought to be adopted for checking them. I would venture to suggest that any judge (whether of a higher or of a County Court) who is of opinion that a witness in giving evidence before him has committed perjury, should have power summarily and at the same sitting of the Court, to convict him of the crime, and inflict some moderate punishment. Such a proceeding, though the punishment were ever so slight, would have much more effect than the present tardy process of indictment; and, moreover, the expense of a prosecution, and the numberless difficulties chiefly of a technical nature in the way of a conviction, afford to perjury at present, in ninety-nine cases out of a hundred, a practical impunity.

"WM. WALKER."

(No. 14.)

"Outwood, near Wakefield, Dec. 21. 1850.

"In my opinion the admission of the evidence of parties to the suit in the County Courts *works well.* Indeed, I consider such evidence indispensable in these Courts, as in nine cases out of ten the demand could not be satisfactorily established, or the defence made out without it.

"T. H. MARSHALL."

(No. 15.)

"Treasury, Jan. 14. 1851.

"As Judge of twelve County Courts in Yorkshire, I have found the law which enables parties to be examined as witnesses in the County Courts, has worked most beneficially, both before and since the extension of the jurisdiction. In acting as chairman of the Committee of County Court Judges, to frame rules for the County Courts, I have, of course, had many opportunities of ascertaining the conclusions of others, and, without any exception, they coincide with my own.

"ALFRED DOWLING."

(No. 20.)

"It has worked admirably, and is the greatest improvement the law is capable of receiving.

"J. HILDYARD."

(No. 22.)

"Oxford and Cambridge University Club, London, Dec. 27. 1850.

"In my judgment the law which enables parties to be examined as witnesses in the County Courts has worked well.

"FRED. T. DINSDALE."

(No. 23.)

"Hawford Lodge, Worcester, Jan. 1. 1851.

"From my experience as a Judge of the Courts of Worcestershire, and having before that appointment acted as the assessor of the Court of Requests at Plymouth, upon the whole the law works exceedingly well: it is, however, true that in some instances parties even in a respectable station of life swear falsely, or adversely to each other: an attentive consideration of the manner and language in which the evidence is given will, in most cases, be sufficient to detect a premeditated lie though it be uttered with every appearance of truth: and when parties are informed that they may be punished for perjury, and that the evidence is recorded in the judge's notes, they instantly become more honest and truth-like."

"BENJ. PARHAM."

(No. 24.)

"Rocklands, near Ross, Jan. 6. 1851.

"I have no doubt that the law enabling parties to be examined as witnesses has, on the whole, worked well.

"As regards its operation in the County Court, I think it must be considered as indispensable; and that the establishment of the Court would have been of little value to the public, but for its introduction; for in a large proportion of Actions on Contracts which come before the Court, the only witnesses to the Contract are the parties themselves—the Seller and the Buyer.

"As regards the policy of extending the rule to proceedings in the Superior Courts, that would seem to depend on three questions. 1. Does the new law tend to the discovery of truth and the furtherance of justice? 2. Does it operate to increase or diminish perjury?

"Now upon the first of these questions my experience certainly confirms my *à priori* expectation, that the evidence of the parties to the suit is a most valuable aid to the discovery of truth and the furtherance of justice. The second question is more open to doubt, for, whilst on the one hand I have had several bad cases of perjury committed by parties to the cause, I have, on the other hand, good reason to believe that suborned perjury is much rarer in the County Court than in the Superior Courts; and I am disposed to affirm with Mr. Amos that, in practice, the new law tends more to the suppression of suborned perjury, from the fear which the professional swearer has of being confronted with the party, who necessarily has better knowledge of the facts, than to the encouragement of perjury in the parties themselves.

"Being thus of opinion that the examination upon oaths of parties to the cause is highly instrumental in the discovery of truth and the furtherance of justice, whilst it is at all events extremely doubtful whether it increases perjury, I am inclined to recommend its adoption in proceedings before the Superior Courts.

"J. M. HERBERT."

(No. 25.)

"53. Upper Bedford Place, Jan. 17. 1851.

"It has worked *well*. I think it peculiarly adapted to the business of the County Courts, where trials by jury are of rare occurrence, and the evidence is considered by a lawyer of experience, accustomed to weigh and judge of the effect of evidence, and to make all proper allowance for the bias of parties witnesses for themselves. I confess, however, I do not feel so confident that it would conduce to the advancement of the ends of justice if adopted in courts where all issues of fact are decided by *juries*. I mention this because I have not felt quite satisfied with the

operation of the law in *jury* cases. I should add, however, that these cases have been so few compared with the great mass of the business of my courts that I do not feel competent to give a decided opinion upon the subject.

"N. R. CLARKE."

(No. 26.)

"Hanley, Dec. 19. 1850.

"The law has worked well, and I may add, that in ninety-nine cases out of one hundred, if such had not been admitted, a total failure of justice would have ensued.

"R. G. TEMPLE."

(No. 29.)

"Bryn-Elwy, Dec. 31. 1850.

"I beg to forward you the following answer to the Society's question,—Decidedly well.

"EDW. LEUIS RICHARDS."

(No. 30.)

"Cwmffrwd, near Carmarthen, Dec. 21. 1850.

"I beg leave to inform you, in my judgment the law which enables parties to be examined as witnesses in the County Courts has on the whole worked well.

"JOHN WILSON."

(No. 31.)

"Dolecothe, Jan. 14. 1851.

"In my opinion, that law has proved beneficial, and numerous debts justly due have been recovered by means of that measure; at the same time I cannot conceal from myself that instances of perjury have occurred, but such instances are also to be found, arising from the examination of witnesses legally disinterested, previous to the period when the 6 & 7 Vict. c. 85. became law.

"JOHN JOHNES."

(No. 32.)

"Wretham Hall, Thetford, Dec. 23. 1850.

"The law has worked VERY well. I might content myself with simply answering your query, but I will add, for the information of the Society, that I have no doubt that a frightful amount of perjury is committed in the Courts over which I preside, but quite as much by witnesses who are not parties as by parties, and nine times in ten by the defendant or his witnesses. I would add, that

if the judge takes pains to arrive at the truth, in my opinion he need very seldom be misled by the perjury; and also that, from the experience I have had for seventeen years in the Superior Courts, I believe that a proportionate amount of perjury takes place at Quarter Sessions and Assizes, with less ample means of detection, and with greater effect in the perversion of justice.

"T. J. BIRCH."

(No. 33.)

"Bury St. Edmund's, Jan. 1. 1851.

"The law which enables parties to be examined as witnesses has hitherto worked well from *necessity*, as in the great majority of cases, which are those of small shopkeepers, the parties themselves (or more commonly their wives) are alone able to prove sale and delivery. Under an extended jurisdiction, and when no such necessity exists, I have great doubts upon the subject, and am inclined to think that it will tend to give a dangerous advantage to unscrupulous plaintiffs over nervous or conscientious defendants. With the present system of cross-examination and uniform trial by jury, I think it would consequently be still more dangerous in the Superior Courts, as I am sorry to be obliged to add that the sanction of an oath is, generally speaking, very little regarded, in opposition to interest.

"JOHN K. EAGLE."

(No. 34.)

"Ashfordby, near Melton Mowbray, Dec. 23. 1850.

"I believe that in full nine cases out of every ten which are tried in the County Courts justice would be utterly unattainable without the examination of one or both of the parties to the suit, or of the wives of the parties. I certainly observe many very fearful cases of perjury which are occasioned by the examination of parties, but they are generally easy of detection. Whether the law works well or ill must, I think, depend upon the view which is taken of *the value of justice;* that is, whether it is well or ill purchased at the expense of a great amount of perjury.

"J. D. BURNABY."

(No. 35.)

"Little Shelford, Jan. 3. 1851.

"In those cases which are decided by a judge, without the interference of a jury, there can be no question that the law which enables parties to be examined as witnesses in the County Courts

has worked well. Indeed, in the majority of such cases, justice could not be done unless such were the law. In regard to those cases which are tried before a jury I do not feel myself equally competent to give an opinion upon the point.

"JOHN COLLYER."

(No. 36.)

"Brackley, Dec. 29. 1850.

"The law has worked *well*. It enables the Court to ascertain the facts of the case from those who are almost always *best*, sometimes *solely* cognisant of them; but my own experience will not lead me to believe that, in cases where false evidence has been given, a failure of justice has, to any extent, been the result; and that I doubt whether wilful perjury is committed so frequently from *interest*, as from *partisanship*. I think too that contradictions in evidence proceed more often from the witnesses representing their suppositions and imperfect recollections as *certainties*, than from a wilful and corrupt determination, on the one side or on the other, to state absolute falsehoods. I therefore conclude that the law in question promotes the discovery of truth; and does not give rise to wilful perjury in any considerable degree; and consequently that it works well.

"JOHN W. WING."

(No. 37.)

"Dec. 26. 1850.

"In my judgment the law has worked well.

"J. B. PARRY."

(No. 38.)

"Lincoln's Inn, Jan. 6. 1851.

"The law has worked well. I will only add, that for this purpose the cases which have come before the County Courts, so far as my experience extends, may be divided into four classes.

"1. Where there is no evidence produced, other than the personal testimony of the plaintiff and defendant, and that is contradictory; these cases are comparatively rare, and the matters in dispute of small amount; but if, in such cases, the parties were not allowed to be examined, a just demand would be irrecoverable. In such cases, I have almost invariably found, that, by a careful examination of the parties, information is obtained, so as to arrive at the justice of the case.

"2. Where besides the parol testimony of the parties, there is documentary evidence, (which I always require to be produced

at the hearing), such as books, and accounts rendered. In these cases, the documents, and parol evidence of the parties, which is always necessary, and used to explain the documents, and conduct of the parties, with respect to the matters in question, afford materials for generally coming to a correct conclusion upon the case.

" 3. The third class of cases is, where there is documentary evidence, testimony of witnesses, and of the parties ; and in this class of cases I have found that the evidence of the parties, so far from obstructing, has invariably assisted in discovering, and ascertaining the truth.

" 4. Another class of cases is, where the plaintiff is examined on his own behalf, and there is documentary evidence on both sides, and testimony of witnesses on behalf of the plaintiff and defendant, and the plaintiff and the witnesses depose to matters which passed between the plaintiff and the defendant, and the defendant is in Court and not examined; and the question materially turns upon what passed between them; in this case the non-examination of the defendant may materially assist in coming to a correct decision upon the plaintiff's demand.

" If the allowing parties to be examined as witnesses for or against each other, in the County Courts, should be considered as tending to the furtherance of justice in the proceedings in those Courts, the rule may not improbably be extended to other Courts; and I am the more induced to say this, as upon a trial in the City of London at the sittings after last Michaelmas Term, before Lord Campbell, C. J., of Ann Lavey, for perjury in one of the County Courts, of which she was found guilty, his Lordship, in passing sentence upon her, is represented as having said, ' A great experiment is now being tried in the administration of justice, by permitting plaintiffs and defendants to be examined in their own cause in the County Courts, and it was a practice which perhaps might be extended to other than County Courts. It was, however, impossible to render that experiment successful, unless the respective parties were to speak the truth.' — *County Courts Chronicle, January*, 1851, p. 3.

" J. Herbert Koe."

(No. 39.)

" East Bergholt, Dec. 23. 1850.

" The clause in the County Courts Act which enables the parties to the suit to be examined, has, in my judgment, worked satisfactorily in furtherance of the ends of justice.

"I answer the question, however, as I understand you to put it: 'Has it worked well in the *County Courts?*' I give no opinion as to the policy of extending it to the Superior Courts simply because I do not understand you to request me to do so.

"I may observe, however, that in those transactions of life in which the parties are very frequently the only persons who have any knowledge whatever on the subject of the debt or matter in dispute, to exclude their evidence is to deprive them of all legal remedy. I need hardly tell you that there are very many such cases before us.

"WM. GURDON."

(No. 40.)

"Jan. 16. 1851.

"As far as my experience of nearly four years goes, the law which enables parties to be examined as witnesses in the County Courts, has worked well. Without that provision I think it would have been impossible to reach the justice of the case in a vast number, perhaps in the majority, of the matters which have come before me.

"In one of my cases, the plaintiff (a Jewess) gave evidence upon which she was afterwards convicted of perjury. The perjury was committed in a collateral matter, viz., in denying that she had been charged with and tried for some offence at the Old Bailey. The inducement to conceal the fact would not have been much less if she had been a disinterested witness.

"J. MANNING."

(No. 41.)

"Serjeant's Inn, Dec. 27. 1850.

"In my judgment, the law which enables *parties* to be examined as *witnesses*, in the County Courts, as far as experience goes in my own, has worked well. I would remark truth naturally works powerfully its own way.

"The detection of perjury is not often difficult, if the judge be patient and pains-taking in investigation; and more especially if he add to them professional experience and practice. I don't remember a motion, in my own Court, for a new trial, on the ground that either party has committed perjury.

"HENRY STORKS."

(No. 42.)

"Dec. 23. 1850.

"I beg to state, for the information of the Council of the Society for Promoting the Amendment of the Law, that since the

9 & 10 Vict. c. 95. passed, I must have tried upwards of thirty thousand cases, in the great majority of which the parties have been examined; and, in my judgment, the law has worked well.

"HERBERT C. JONES."

(No. 44.)

"West Lodge, Downing Coll., Cambridge, Dec. 23. 1850.

"From the experience of some thousands of cases, I am abundantly satisfied that the law in question has worked excellently.

"From a very slight experience hitherto of cases between 20*l.* and 50*l.*, I incline to think that the law will be attended with more beneficial results than in cases of smaller amount.

"A. AMOS."[1]

(No. 45.)

"Westminster County Court, 82. St. Martin's Lane, Jan. 1. 1851.

"The law which enables parties to be examined as witnesses in the County Courts has worked *well*.

"F. BAYLEY."

(No. 46.)

"104. Eaton Place, Belgrave Square, Dec. 30. 1850.

"I beg to state, that 'in my judgment, the law which enables parties to be examined as witnesses in the County Courts has worked well.'

"J. FARQUHAR FRASER."

(No. 47.)

"20. Eaton Square, Dec. 24. 1850.

"The law enabling parties to be examined has, in my opinion, worked admirably; and I am disposed fully to concur with the opinions stated by Mr. Amos, in his work on this subject. The examination of the plaintiff has been the means of enforcing a multitude of just and admitted claims which would otherwise have remained unnoticed and undischarged; while the cross examination of both parties has proved to be a most efficient and unfailing instrument for the discovery of truth. The facility afforded for perjury is and must be the only objection; and it is one which my experience induces me to think of little, if any, weight. It is true that denials of a just claim upon oath are not uncommon, but they are generally not positive and absolute, but are merely denials *modo et formâ*. Thus a defendant will swear that he does not

[1] Mr. Amos has published a valuable pamphlet in favour of the extension of the practice.

owe the money; but, when called upon to explain, will say that he does not consider he owes it, because he has some claim upon the plaintiff, consisting, it is true, of perhaps only a moral obligation, an unrequited service, or an implied forgiving of the debt; but still sufficient to show that the defendant, being obliged either to admit or deny, takes the latter course, subject to explanation. My own conviction is that the moral obliquity not directly amounting to perjury, so often perceivable among litigants, is mainly due to the system hitherto adopted in the Superior Courts under which *subtleties enabling men to evade their obligations*, have been so long substituted for the *broad moral principles of right and wrong*, that ultimately the power of legally resisting a just claim has been confounded with the right to do so. This spirit, fostered and encouraged by legal practitioners, is the real difficulty with which I have to contend, and it is one which I am only enabled to meet by the examination and cross examination of the parties.

"GEORGE CLIVE."

(No. 48.)

"West Wickham, Kent, Dec. 26. 1850.

"In my judgment, the law which enables parties to be examined as witnesses in the County Courts has worked well. I have arrived at this conclusion from experience; *à priori*, I argued against the enactment of the 83d section.

"I am convinced that, in a very great number of the cases which came before me, justice could not be administered at all without examining the parties, for their dealings take place entirely between themselves and their wives, without the employment of shopmen or servants. But apart from this consideration, it gives me the greatest satisfaction to reflect (and in justice to those whom we call the lower orders to proclaim), that in my Court, in which many thousand cases are disposed of every year, I have very seldom found the statements of the contending *parties* so irreconcilable as to drive me to the conclusion that perjury must have been committed on the one side or the other. Where no professional assistance is employed, my practice is to *begin* by examining the parties; and in the majority of those cases in which both plaintiff and defendant appear in person, I find that, perhaps unwittingly, they agree, as it were, upon a case for the opinion of the Court. Where witnesses are examined, I often find it more difficult to reconcile their evidence than the statements of the principals. This may seem paradoxical; but they generally know

less of the whole matter in dispute; partial knowledge is imperfect; they eke it out with zeal; they believe that to be true which they do not know to be false, and swear accordingly; and the man who swears stoutly for another is a good witness in his own eyes and in those of the by-standers: the man who swears falsely for himself can lay no flattering unction to his soul, and he has before him the fear of detection in a crowded Court, in which, though many may be selfish, none sympathise with selfishness. I believe, however, that with most of the *parties* to a cause better feelings are at work. In many a just horror of perjury: in more, perhaps, that point of honour which withholds worldly men from flying from their bargains, and the knowledge, almost implanted in us, that honesty is the best policy.

"GEORGE CHILTON."

(No. 50.)

"Folkstone, Dec. 26. 1850.

"I beg to state that, in my judgment, the law has worked remarkably well.

"CHARLES HARWOOD."

(No. 51.)

"Brighton, Dec. 26. 1850.

"I have no hesitation in saying that it has worked exceedingly well.

"WM. FURNER."

(No. 52.)

"Curdridge House, near Botley, Hants, Dec. 24. 1850.

"I am entirely convinced of the advantage of enabling parties to be examined as witnesses in any Civil Court. The ordinary transactions of life do not go on upon the supposition that they are to be proved afterwards in a Court of Justice. And I believe that to shut the mouths of the persons who often know most of the matter, is productive of the greatest injustice. I think that persons examined in a public Court of Justice are very reluctant to make statements which should induce their neighbours and friends to suspect them of perjury; and in this respect, the practice or results of hearing parties in a private room before an arbitrator, appear to me to afford no criterion to judge by. I wish to express in the most unqualified manner, that the hearing of the parties is most advantageous, and indeed necessary, to prevent injustice, and that it ought to prevail in all the Courts of Justice in the kingdom.

"C. J. GALE."

(No. 53.)

"Winkfield House, Jan. 4. 1851.

"I regard it as a measure subservient in a very high degree to the interests of justice, and productive of no practical evil worthy of being put in competition with its advantages.

"The subject is one of which I had long felt the importance, and to which my attention was necessarily drawn in the course of a pretty large practice as a Commissioner of Bankrupts, and as Arbitrator, and also as Chairman (during eight years) of the Bath Court of Requests. In each of these offices I had opportunities of observing the operation and results of the practice, and my subsequent experience as a Judge of County Courts has fully confirmed my previous impressions in its favour.

"In many cases the examination of the parties furnishes the only attainable evidence upon the question at issue, and the alternative is either to have recourse to it, or to leave the party (however just his title) without remedy. In numerous other instances this mode of proof affords direct and satisfactory evidence of the material facts, when they could otherwise only be got at imperfectly and doubtfully by the testimony of half-informed witnesses, attended by an expenditure of time and money, rendered necessary by what appears to me the irrational exclusion of better evidence.

"That the examination of the parties themselves is, in a large majority of cases, the most efficacious mode of eliciting the truth, and consequently of securing a just decision, is not only a reasonable presumption *à priori*, but I believe will not be denied by any person experienced in both modes of procedure.

"The knowledge that both parties will be openly heard and examined and cross-examined in Court, influences many defendants to settle their just debts without trial; and many others to appear simply to make a frank admission of the justice of the demand, or to correct partial errors, or (upon a statement of special circumstances) to claim indulgence in point of time for payment of debt and costs.

"The only intelligible objection to the examination of parties as witnesses (as far as I am aware) is, that it creates the temptation, and affords the opportunity to perjury. I believe the danger to be an unusual one, except in very rare instances. Speaking from my own experience, I do not hesitate to assert that wilful perjury is very seldom resorted to, and that, in the face of a Judge of ordinary penetration and attention to his duties, it is next to impossible (in the case especially of the parties themselves) that it

should succeed. Apart from the results of actual experiment, it would not (I apprehend) be difficult to show that the probabilities of the case would lead theoretically to a similar conclusion in favour of the mode of proof under discussion.

"Juster views than formerly prevailed on the Law of Evidence have recently led to the admission as competent witnesses, in the Superior Courts, as whole classes heretofore excluded on the ground of interest. The change is known and felt to be a highly beneficial one, removing a formidable barrier to the course of justice, and productive of no evil consequences. The same principle is applicable equally to persons interested directly as parties, and to persons not parties to the suit, but yet involved in point of interest in its result; and I cannot but regard the exclusion of either as a great error in Jurisprudence, leading in many cases to a failure of justice.

"J. G. SMITH."

(No. 54.)

"Cheltenham, Dec. 26. 1850.

"In my judgment this law has worked well, as giving to the County Courts, in innumerable instances, the only means of ascertaining the truth — the proper ground of judicial decisions.

"To the lamentable drawback from this great advantage I am not insensible, — that the law often gives persons wicked enough to commit perjury opportunities, which they could not otherwise have, of being guilty of that crime. Instances of direct contradiction have frequently occurred, not to be accounted for on any other supposition than that of one or other of the parties being perjured. I have, however, the satisfaction of knowing that in the Courts in this county cases of this sort are becoming more and more rare; and I feel confident this great evil does not outweigh the great advantage of having the evidence of the persons most likely to know the truth — the interested parties.

"JAMES FRANCILLON."

(No. 55.)

"Bristol, Dec. 26. 1850.

"I beg to state, not merely as matter of opinion, but as a fact, that there is scarcely a week in which the law does not produce, in the Bristol County Court, the *most gross perjury*.

"In my opinion, therefore, neither of the parties ought to be examined, either at the trial of the cause, or under section 98., &c.; and while the commission of crime would be thus prevented, I do not think that there would often be a failure of justice.

"ARTHR. PALMER."

(No. 56.)

"Starnham Cliff, Salisbury.

"The law in the County Courts has worked well.

"In one third of the cases, if not more, the evidence of the parties is the only evidence, without which the injured party would be without remedy.

"EDWARD EVERETT."

(No. 60.)

"Exeter, Dec. 27. 1850.

"I have hitherto found that the suitors in actions of debt have, for the most part, been small retail dealers, delivering their *own* goods, and keeping their *own* accounts. Consequently, the present power of examining the parties and their wives as witnesses in the County Courts has been the means of recovering an immense amount of debt, which might otherwise have been lost for want of evidence. This great advantage, however, is not without a mixture of evil, in the perjury which parties are too frequently tempted to commit in support of their own case.

"On my circuit I have had occasion to warn the suitors not to rely *too* much on their own evidence; and that I should expect confirmatory evidence to be adduced, when the nature of the case would admit of it.

"On the whole, I should decidedly say that, in all descriptions of actions, the balance was in favour of the expediency of admitting parties as witnesses, and that the experiment may be said to have *worked well* in the County Courts.

"G. G. KEKEWICH."

One word more as to County Courts. This great amendment of the law is important in many respects; but in one its history is invaluable, as showing the bad effects of postponing unduly the improvement of our system. It is in this view only that the few facts which follow are stated.

The act of 1846, giving local jurisdiction in all causes of debt and contract, and in all personal actions generally, where the debt or damages are not above twenty pounds, except where title is concerned on purchase, or disputed will, or libel, malicious prosecution, seduction, and breach of promise of marriage, was passed after Lord Lyndhurst's bill to the same effect had the year before been dropt owing to vexatious

opposition of interested parties in the Commons. The new jurisdiction was found to work well, and in 1850 it was extended to 50*l.*, with some important additions. Of these the most essential were three. A concurrent jurisdiction was given to the Courts of Westminster in all cases between 20*l.* and 50*l.* by the provision as to costs; an appeal in all matters of law, or the admission or rejection of evidence, is given; and a jurisdiction is conferred on the County Court in all cases whatever, without regard to the amount of the debt or damage, or to the kind of matter in dispute, provided both parties agree in being satisfied that the cause shall be tried before the County Court.

Thus the two acts of 1846 and 1850, together give not entirely but very nearly the whole jurisdiction given by the bills brought into the House of Lords, first in 1831 and afterwards in 1833. Substantially those bills are now enacted by the later statutes. As far, at least, as those later statutes go, they are precisely parts, and very considerable parts, — indeed by far the greater portion of the earlier bills, especially the bill of 1833, which was only lost in the Lords by the narrowest possible majority, and which but for that majority would have been the law of the land for the last seventeen years.[1]

Now "that is our case," as men say at Nisi Prius. Thus has the country been deprived for this long period of time of the inestimable benefits of cheap and easy justice, because

[1] We have been somewhat surprised at observing this denied, in respectable quarters, and by friends of law amendment. As a sample of the carelessness with which such denials are made, we may mention one. The appeal clauses, (say the objectors,) a valuable part of the Act, 1850, were introduced into it in the Commons. We have taken the trouble to look at the Bill, 1833, and we find that ss. 14, 15, and 16. in the appeal clauses of 1850 are taken verbatim from clauses 52, 53, and 54. of 1833; as is also the general jurisdiction by consent. S. 17. of 1850 is taken, word for word, from clause 16. of 1833; and so is the concurrent jurisdiction provision. Then, to show that these additions were *not* made in the Commons, we have the Commons' print of Aug. 2. 1850, which notes those sections as added by the Lords;—indeed, there is in the Lords' library a copy of the Bill, 1833, with pencil-marks at pp. 6. 20. and 21., showing that the Lords actually copied the clauses, 1850, from the Bill, 1833; for it was necessary to insert "County Court" instead of "Judge in ordinary." We doubt if an erroneous assertion was ever more plainly refuted.

from party motives, or from whatever cause, a measure was rejected in 1833 which no one very strenuously opposed in 1850. There remains a valuable portion of the former measure still unenacted. By that, jurisdiction in Bankruptcy was given to the local Courts, and thereby the necessity of creating some score or more of officers was prevented. Also a power was given to the local Judges of acting as Masters in Chancery, and taking evidence and reporting to the Courts in London. Let us see if the experience of the benefits resulting from the rest of the measure, and the sense of the evils which have arisen from delaying its adoption, will stimulate the Legislature now to make this further step. The first bill, that of 1831, which was referred by Lord Brougham, at Lord Lyndhurst's request, to the Common Law Commissioners, gave a further jurisdiction in questions of Legacy; but the Commissioners, affirming the rest of the bill, recommended that this part should be left out, which it accordingly was in the bill of 1833. The Reform Bills of 1831 and 1832 prevented the further proceeding with the measure, and it was brought in early in 1833.

ART. XII. — THE HEAD OF THE CHURCH.

Is Her Majesty Queen Victoria, in legal acceptation, the *Head of the Church?* — Certainly not. At many public meetings, and by many highly respectable persons, that title has of late been frequently applied to Her Majesty, and we are not inclined to dispute that, in a loose and popular, but very intelligible sense, it may be reasonably enough understood to indicate those high ecclesiastical functions with which the Crown is by law invested. We go further: the use of it has been sanctioned by the authority of several eminent churchmen, and in particular by one whose name must ever be held in reverence, and who, from the time of Queen Elizabeth to the present day, has been justly denominated "the *judicious* Hooker;" for in the eighth Book of his Ecclesiastical Polity there is a lengthened defence of the

title. But the question to be considered, in a publication dedicated to the interests of the Law, is not whether the brightest luminaries of the English Church have employed this term properly or improperly, in reference to the Royal authority of the Sovereigns of the Realm; but whether it be a title belonging to the Crown *by law*, and conveying to the Sovereign for the time being (as all legal titles do to their holders) certain definite rights and privileges, to which they could otherwise have no legal claim.

And here, on the very threshold of our discussion, we meet with a fact, which must strike a common understanding as perfectly conclusive. *The Queen herself has never taken the title.* And why? Because no one of her predecessors ever took it, except Henry VIII. during the twelve last years of his reign, Edward VI. during his short reign of eight years, and his sister Mary during the first year of her reign; in all twenty-one years: and these three Sovereigns did take the title, because it was conferred on them by a parliamentary statute, which was only in force during the one-and-twenty years just specified. If Her present Majesty has a legal right to this title independently of the statute in question, she had a right to it from the first moment of her accession to the throne: and if she has a right to it by the Common Law, so had her predecessors, from the time of Athelstan, who is said to have been the first king of all England 927 years ago. Her Majesty therefore, by the non-assumption of the title, if it really belonged to her at Common Law, would have stultified all her predecessors for near a thousand years, and (*absit invidia verbo*) she would have stultified, if not HERSELF, at least all the Ministers, by whose advice her political acts, both of commission and of omission, must be constitutionally presumed to have been guided. We turn, therefore, to the statutory ground of the title, of which Mr. Justice Blackstone favours us with an account, not a little extraordinary from a lawyer of his eminence. "The King (says he) is lastly considered, by the laws of England, as the head *and* supreme governor of the national Church. To enter into the reasons upon which this prerogative is founded, is matter rather of divinity than of law. I shall

therefore only observe, that by the statute 26 Hen. 8. c. 1. (*reciting* that the King's Majesty justly and rightfully is, and ought to be, the supreme head of the Church of England, and so had been recognised by the clergy of this kingdom in their Convocation) it is *enacted*, that the King shall be reputed the only supreme *Head*, in earth, of the Church of England, and shall have, annexed to the imperial crown of this realm, as well the title and style thereof, as all jurisdictions, authorities, and commodities to the said dignity of supreme Head of the Church appertaining." (Com. i. 279.) Now certainly, if the statute, which the learned commentator thus cites and relies upon, were in force at this day, whatever we might think of the truth of its recital, or the wisdom of its enactment, it would form a full and sufficient legal ground for the title in question; and would only increase our astonishment that no one of our kings or queens, from Queen Elizabeth to our present gracious Sovereign, both inclusive, should have adopted a title quite as authentically conferred, or rather more so, than that which they have all borne, of "Defender of the Faith." But the fact is, that by some strange oversight, Mr. Justice Blackstone omitted to mention, that the statute 26 Hen. 8. c. 1. remained in force but twenty years, was then formally repealed, and has never since been revived; so that neither its recital nor its enactment has, for the last 297 years, had the least force in law whatever. That statute annexed to the Crown "all jurisdictions, authorities, and commodities to the said dignity of the supreme Head of the Church appertaining." What these were, it would be somewhat difficult to discover by any legal research; but how large and comprehensive they were deemed to be in the opinion of King Henry himself, and of his parliament, we may judge from his and their conduct. As to the King, he sate as Judge of Appeal from the Archiepiscopal Court, to try Lambert for disbelieving Transubstantiation. This was the King's notion of *jurisdiction;* he argued with the prisoner to prove that a disbelief in Transubstantiation was heresy — this was his notion of *authority;* and failing to convince the prisoner, he burned him — this, no doubt, was *commodity*. He burned poor Lambert alive for holding the 28th article of the Church

of England! He did this too, as Head of the Church. "It was wonderful (writes Lord Cromwell) to see how princely, with what excellent gravity and inestimable majesty, his Highness exercised there (viz. at Lambert's trial) the very office of *Supreme Head of the Church of England.*" (Collier, 2. 152.) So true is the remark of Lord John Russell:—"Henry was not merely the minister of bigotry: he taught from his own mouth the opinions which were to regulate his subjects; he contained in his own breast the rule of Orthodoxy; and he had the triumph of confuting the heretic, whom he had afterwards the gratification to burn." (English Gov. p. 40.)

Nor were the two Houses of Parliament behindhand with the King in their exaggerated conceptions of his ecclesiastical supremacy. They not only passed, with his personal intervention, the Bloody Act, as it was called, of Six Articles (stat. 31 Hen. 8. c. 14.); but they enacted that any spiritual person maintaining any thing contravening the King's instructions or determinations, made *or to be made,* should for the third offence be burnt alive (stat. 34 & 35 Hen. 8. c. 1.): thus binding the whole nation to believe any doctrines, they knew not what, which it might at any future time please this capricious tyrant to promulgate. However, it must always be kept in mind that neither Henry nor his Parliament, nor the majority of the clergy or of the people, in 1542, held any of the distinctive doctrines of the present Church of England: so far from it, that any person publicly known at that time to maintain the Thirty-nine Articles now in force would, to a certainty, have been burnt alive; which makes it surprising that any one, in the present day, should call Henry a *Protestant* King; he being as cruel and remorseless a persecutor of all true Protestants, as ever Domitian or Nero was of the early Christians. On his death, indeed, the Protestant religion at once began to spread, under the favour of the Lord Protector Somerset. The most atrocious of Henry's acts, such as that of the Six Articles, were forthwith repealed: but the young King, during his short reign, retained the title of Head of the Church: and what is somewhat remarkable, his sister Mary, though a rigid Roman Catholic, also placed that title before

the statutes of the two first sessions of her reign. She was soon, however, advised that it was a title to which the Pope laid claim; and therefore in the third session she dropped it; and in the following year found a Parliament as ready to revoke all her father's acts against Rome, as his Parliaments had been to enact them. Accordingly, by stat. 1 & 2 Phil. and Mar. c. 8., the former statute annexing to the Crown the title of Head of the Church, (viz.. stat. 26 Hen. 8. c. 1.) was, among several others, formally *repealed.* In 1558 Mary died, and Elizabeth, a true Protestant, succeeded to the throne. The very first act of her reign was to establish the Church of England on the basis on which it has ever since stood (stat. 1 Eliz. c. 1.), which statute may therefore be called the Magna Charta of the Church of England. It revived all the *good* laws of Henry and Edward, which Mary had repealed; but expressly and distinctly *confirmed the repeal* of those which it did not revive. The words of sect. 13. are, "That all other laws and statutes, and the branches and clauses of any act or statute repealed and made void by the said Act of Repeal made in the time of the said late King Philip and Queen Mary, and *not in this present act specially mentioned and revived,* shall stand, remain, and be *repealed* and made void, in such like manner and form, as they were before the making of this act; any thing herein contained to the contrary notwithstanding." And as the statute 26 Hen. 8. c. 1., which gave the title of Head of the Church, was not in the act of Elizabeth "specially mentioned and revived," it was *de novo* by the latter act, repealed and made void; and so it remains to this day.

And yet Mr. Justice Blackstone having stated the enactment of stat. 26 Hen. 8. c. 1., and not dropt a hint that it did not continue in force to his own time, goes on to say, "Another statute *to the same purport* was made" (stat. 1 Eliz. c. 1.) — To the same purport! — Prodigious! an act of Elizabeth enacts that one of Henry "shall stand, remain, and be repealed and made void:" and yet we are told that the act of Elizabeth was to the same purport as that of Henry! Mr. Justice Blackstone was a great lawyer, a very great lawyer; but *aliquando dormitat Homerus.*

What then was the legal effect of the statute of Elizabeth? And why do we call it the Magna Charta of the Church of England? The legal effect was great, and greatly beneficial. It connected the Church with the State, by clear and definite bonds. It substituted for the term *Head* of the Church, which had been a source of great and fatal abuse, the unobjectionable term *Governor:* and, what was of still greater importance, it defined and explained at large the ecclesiastical rights and privileges annexed to the English Crown, which had been left by Henry's statute altogether vague and obscure. The Pope called himself Head; and Henry called himself Head; and both the one and the other assumed, in virtue of that title, the power of imposing such *doctrines* as they thought fit on the minds and consciences of men; but under the term Governor, as defined and explained by the act of Elizabeth, the positive power was restrained to *things* and *causes*, and to persons in respect of things and causes. It was clear that the Queen could not sit in person as judge of appeal, and from her own mouth condemn heretics to be burnt; but she was "by letters patent under the great seal of England," to authorise such of her natural born subjects as she thought fit to exercise jurisdiction under her, and to visit, order, correct, &c., in spiritual or ecclesiastical matters. With regard to *doctrines*, the queen, as governor, had only the negative power, under statute 25 Henry 8. c. 19., (one of the good laws revived by statute 1 Elizabeth, c. 1. s. 6.,) of granting or refusing her assent or licence to any canons, constitutions, or ordinances of the clergy and of allowing or not allowing them to meet, for the purpose of framing such acts, in Convocation or otherwise. By virtue of this power the Church with assent of the Crown framed its Articles in 1562, and its Canons in 1603; and being thus fully constituted, it does not at present seem necessary that the Crown should be called upon to allow any similar meeting.

The substitution of the term "Governor" for that of "Head" may at first sight, and at this distance of time, appear to be a thing of little moment; but to those who had seen the fires of Smithfield lit up by Henry, as *Head*, and by Mary, on behalf of the Pope, as *Head*, the word itself was calculated to inspire feelings of horror. A large portion too of the Pro-

testant population regarded the term, Head of the Church, as appropriate to Christ alone; and, as we learn from Bishop Jewel, this was the feeling of the queen herself. It is said that this suggestion was made to her by one of the English divines who had been in Germany; but, howsoever this may be, the fact undoubtedly is, that the term Head was advisedly rejected, and that of Governor advisedly adopted, by the legislature; and to this determination the law of the land and the practice of our sovereigns have ever since conformed.

Lastly, it may perhaps be contended, that though the Queen has no right to the title of Head of the Church, either by Common or Statute Law, she has in virtue of a Canon granting that title which was framed by the Church itself, in Convocation, in 1531, with the King's assent.

To this we answer, first, as to the general body of the laity not sworn to the Thirty-nine Articles, that they at least are not affected by the Canon of 1531, nor by any other Canon, *proprio vigore*, that is to say, unsupported by Common Law or Statute. This point, as our readers well know, has been undisputed law ever since Lord Hardwicke's celebrated judgment in 1737.[1] Secondly, we say, that neither the clergy nor those laymen who, holding ecclesiastical offices, have been sworn to the Thirty-nine Articles, can possibly be bound by the acts of men who would have held those articles to be rank and pestilent heresy. They declared Henry to be the head of a National Church; but what is a National Church? a portion of the Universal Church of Christ bound together by certain doctrines, certain articles of faith, more or less clearly expressed, and more or less strictly maintained; but the doctrines, the articles, the Canons of the National Church of England of the present day, are so directly opposed to those of the self-styled Church of England of 1531, that the holders of the latter would and did hand over the holders of the former to be burnt to death, under the writ de Hæretico Comburendo. And after all, how did these men of 1531 confer this title on their temporal sovereign? Plainly, distinctly, without subterfuge or equivocation? No, with the convenient reservation, which the rankest Romanist amongst them could easily reconcile to his own conscience — *quantum*

[1] Middleton v. Croft, 2 Atk. 650.

per Legem Christi licet. Why, at that time of day Henry had not wholly broken off with the Pope. It was possible that the Pope, whom the Romanists deem to be head of the Universal Church, might delegate to Henry a quasi-headship over that portion of it which was then called *Ecclesiæ Anglicana*; and which, together with its sovereign, perfectly agreed with him in all those doctrines which the present Church of England stigmatises as idolatrous, and repugnant to the plain words of Scripture. Even this modified grant, too, was made under duress. The King had already shown his eager desire for the plunder of the Church, and his readiness to subdue opposition by the axe and the stake. A grant from such a source, so extorted, and so modified, cannot possibly be acceptable to our good and gracious Queen, whom God long preserve![1]

POSTSCRIPT.

A LEGAL revolution has commenced. It is not necessary to say any more: of this fact there can be no doubt. The administration of the law by means of the existing procedure of the Superior Courts is an intolerable grievance, and this is now sufficiently admitted, and must be provided for. We do not wish to be guilty of any exaggeration, when we say that we do not know any party in the State, or any individual member of any party, worthy of the slightest attention, prepared to deny this. On the contrary, the broadest admissions of it come from quarters the least expected to make them; and our only fears are now that this feeling will take a wrong direction; and it is in a truly conservative spirit that we sit down to write our Postscript to this number.

We have at heart the best interests of the State, when we

[1] NB. The oath contained in sect. 19 of stat. 1. Eliz. c. 1., in which she is styled "the only Supreme Governor of this realm, &c. as well in all spiritual or ecclesiastical things or causes as temporal," was abolished by stat. 1 Wm. & Mar. Sess. 1. c. 8. s. 2. But this neither affects sect. 13 of Elizabeth's Act confirming the repeal of stat. 26. Hen. 8. c. 1., nor s. 18. defining the powers of the Crown in matters ecclesiastical.

say that the very existence of good laws and of honest and able lawyers depends on the right means being taken properly to guide and satisfy the just demands of the community for law reform. As in all revolutions, there will be violent and unreasonable men, whom nothing will content; nor will sordid men be wanting, who seek to turn such occasions to their own base purposes, just as in times of tempest obscene birds make their appearance screaming for garbage: there will be also men, as there always have been on such occasions, who, in the very extremity of the case, will concede nothing. These small-class opinions—held by knots of persons, if any—may be safely disregarded: so may an opinion more generally shared when it has no real foundation; but now we have to deal with an opinion most widely spread, and having, alas! only too wide and firm a foundation in truth, for no one can dispute that our Common Law procedure is based on pedantry and technicality, or that our Equity procedure is fraught with enormous expense and almost interminable delay. Now, if any one thinks we are using language too strong for the occasion, we must tell them that this is not the time for us, who have long been on this subject, as those who "watch for the morning," to conceal the truth, but to tell those in authority, ere it be too late, the real state of the case. The public mind is now inflamed as to Law Reform; and a great statesman and philosopher shall tell us what is the history of all reformations: — "Early reformations are amicable arrangements with a friend in power; late reformations are terms enforced upon a conquered enemy. Early reformations are made in cold blood; late reformations are made under a state of inflammation. In that state of things the people behold in government nothing that is respectable. They see the abuse, and they will see nothing else. They fall into the temper of a furious populace provoked at the disorder of a house of ill-fame; they never attempt to correct or regulate; *they go to work by the shortest way; they abate the nuisance,* — THEY PULL DOWN THE HOUSE."[1] Now we would ask whether the reformation of our law, which the public is now demanding, is an early

[1] Burke's Speech on Econ. Reform, "Works," vol. iii. p. 247., ed. 1815.

or a late one? and if it is a late one, as most assuredly it is, it will be effected, if great care be not taken, in the manner in which all late reformations are effected, with violence and injustice. If nothing will convince our rulers of this but past experience, we will refer only to the history of the late session, when, perhaps, the most important change which was ever made in the administration of the law,—the raising the jurisdiction of the county courts from 20*l.* to 50*l.*,—was carried in opposition to the government, and to the declared opinions of all the law officers of the Crown and the great bulk of the legal profession. A majority thus excited would have done anything of a similar kind; and we have received assurances from many then sitting in the House, that if it had been proposed to abolish the Court of Chancery, that majority would undoubtedly have voted for it. Flushed with such great success, it is not to be expected that the House of Commons will now become cool and moderate. It looks upon Westminster Hall "as a house of ill-fame." The Commons will go to work in the shortest way, and, to abate the nuisance, they will not hesitate to pull down the house! This is our sincere conviction. This is the great danger to be guarded against; and we are most anxious to guard against it by all possible precautions. Now let us freely inquire into the steps taken to provide for and satisfy this strong desire for the reformation of the law; and we only express our sincere belief when we say that the present government has an earnest desire to do what is just and right in this matter. We think, however, that the means that have been taken are inadequate, and we are bound to say so. Two Commissions have been appointed; the first, composed of eminent Common Law advocates and pleaders, to consider and report on Common Law Process, Pleading and Practice; the second, composed of eminent Equity advocates and pleaders, and one Common Law barrister of great eminence as a pleader, to consider Equity Process, Pleading and Practice. Now all the gentlemen appointed on these Commissions are in large practice, and of great talents and experience, and they deserve the thanks of their country for accepting this arduous service; nay, some of them are the

very persons whom we would have selected as most fit for the occasion. But, in our opinion, there is a fatal vice in the constitution of both Commissions. They have no authority even to inquire into the general jurisdiction of the Courts of Westminster Hall, far less to frame a procedure applicable to all complaints. If they have power to frame a new procedure at all, which perhaps is doubtful, it must be one applicable only to one end of Westminster Hall. Allowing the Commissioners the best intentions and the most hearty desires to do complete justice to the subject, they will find it impossible under their present Commissions. We should add that there is yet a third Commission, as we understand, appointed to frame rules of procedure for the County Courts (a very important duty, the proper investigation of which would be most likely to assist the deliberations of the other two Commissions); and thus we find that one body of learned gentlemen are considering one small part of the subject; a second, another small part; and a third, a still smaller portion: at a time when all should be united together: when all that is wise, all that is learned, all that is energetic, all that is discreet, should be collected under one common roof, to rescue the administration of justice from reproach and frame a procedure applicable to all complaints, or place on sure and eternal grounds the reasons for keeping up the present division of jurisdiction. We say this with no necessary reference to the New York Code. That was a mere circumstance just as accidental as Mr. Field's visit to this country. Its chief importance has been to show the extent and depth of public and professional feeling on the subject.

In the earnest pursuit of truth now on foot, it would have been impossible to have prevented the raising of this broad question had New York never existed. We may add that valuable as that code is, we hope it will only stimulate our Law Reformers to do better, and we are sanguine that we shall succeed.

With every wish, then, to do credit to the good intentions of the present authorities, we think it our duty to say, that the means at present devised for properly satisfying the public feeling in favour of the amendment of the law are inadequate. If any more *inquiry* is sufficient, — we have already stated our

doubts on this point[1],—it must be made a Commission with a range far wider than any yet drawn; composed of gentlemen of varied professional information, lawyers, but also jurists, men in no way biassed, or liable to suspicion of bias, in favour of any existing system, and their duty will be to frame A SYSTEM OF PROCEDURE APPLICABLE TO ALL MATTERS at present divided unnecessarily and hurtfully, as it appears to us, into Common Law, Equity, and Ecclesiastical, each of which is now regulated by a procedure distinct from the other. To this body of men might well be entrusted the duty of digesting the unwritten law. We are bound to declare this to be our conviction. If the present Commissions are persisted in, we shall have a series of abortive Reports, in which the learned Commissioners will be obliged to confess that they could not state any opinion on the most important matters before them because it was not within the terms of their Commission! This has happened already, in the case of the Registration Commissioners, and it will happen again. Nay, if any proof were wanted, we should find it in the "suggestions" already published of some of these Commissioners.

This proposition we make as the friends of moderate Law Reform,—and we trust we have never shown ourselves otherwise, — and who is to oppose it? There are only two classes of persons who would under any circumstances attempt any opposition. The Bar, so far as their opinions have reached us, considers the whole matter a fit subject for inquiry; but, what will the Judges, what will the Attornies say? Let us begin with the latter. We should be sorry to see any step taken contrary to the deliberate and well ascertained opinions of this class of the profession. But there appear to be strong symptoms of the general adhesion of this most useful branch of the profession to the ranks of Law Reform. The last report from any Law Association that we have seen is that of the Manchester Law Association; and this influential and learned body avow their conviction that Law Reform should be the governing principle of their society. We cannot object to the terms in which they express this resolution; for quoting avowedly from this Review, they adopt our own sentiments, in our own words.

[1] *Antè*, Art. I. p. 242.

"Impressed," they say, "with the conviction that the interests of the profession and the interests of the public are identical, your Committee have felt that 'the right of the public to well-defined laws, freed as far as possible from technicality, and administered purely and impartially, at the least possible cost,'[1] should be the moving principle of law reform;" and they say that, during their year of office, they have acted up to it.

And in other parts of this document they cite our boldest declarations with approbation. Now, under any circumstances, we should be pleased with this concurrence of opinion, but we draw from it a source of satisfaction far deeper than any mere compliment to ourselves. The Lancashire attornies are, it is well known, inferior to none in this country. In skill, in knowledge of business, in integrity, they have frequently surpassed all other practitioners; and this part of the country has taken a remarkable lead, as we all know, in many important reforms. They have had, doubtless, the innocence of the dove, but they have also had full credit for a fair share of the wisdom of the serpent. This able and shrewd body of men, then, declare their conviction that justice should be administered freed from technicality and at the least possible cost. This we believe to be true wisdom; but we have not always heard such sentiments avowed by Law Associations! We hail this Report then as the commencement of a better order of things. At length we find that the real law reformer is considered, not as the enemy, but as the friend of the profession; and if we have in the slightest degree contributed to the adoption of this truth, we are amply repaid for all our labours in this cause: and now, these great facts once admitted, we look forward to no ordinary help from this large, able, and public-spirited body of men. Nor do we doubt that the sentiments thus declared by the Manchester Law Association will be shared by other similar bodies, and that the only struggle will be who shall be first in the race.

Well, if the Bar and the attornies do not oppose, will the

[1] These words occur at the end of the Art., in our last Number, "On the Emoluments of the Legal Profession," 13 L. R. p. 187.

Judges prove adverse even to inquiry? The Judges of England are endeared to the people of England, not only by their learning and their integrity, but by their ready sympathy with the wishes of the people. We have no fear that the present Bench of Judges will carry down to posterity a different character. We have very recently endeavoured to show how well these eminent persons deserve the station and the emoluments they possess. Long may they have them, and long may they preserve the associations which they now so deservedly enjoy in the minds even of Financial Reformers. No, no! we will never believe that if all others are willing to adopt a change which may prove beneficial, the Judges of England will be the only persons to oppose it, far less to inquire into its operation in another country. We repeat our question, then — who is to oppose a proper inquiry?

We much regret to have to mention the death of a gentleman well known to all law reformers, — Mr. George Spence. He was born, we believe, in London. His father was an eminent dentist, and long practised in Hanover Square. George, his eldest son, was sent to a school at Richmond, kept by the Rev. Robert Delafosse, which he left about the year 1802. In a letter of one of his schoolfellows, now lying before us, he is described as "an industrious and talented youth, who, by his gentleness and kindness of disposition, won the affection of his schoolfellows, and I have never forgotten a few acts of personal kindness to myself." From school he proceeded to the college at Glasgow, but we have never understood that he there particularly distinguished himself. He then returned to his father's house, and chose the law as his profession. He was first articled to Mr. Linton, a solicitor; but he afterwards determined to come to the Bar, and became a pupil of Mr. John Bell, the most celebrated draftsman of the day. In 1811 he was called to the Bar, by the Society of the Inner Temple. Another informant, who was well acquainted with him, writes to us: "When young, Mr. Spence was very eccentric in his dress and appearance. His father was strict with him in money matters, which materially influenced him in his studies, to gratify his ambition, which was then very great, to get on in his profession, and to become independent." Under these

circumstances he soon got into practice, and we believe that he had, at one time, the largest business ever known to have been enjoyed at the Chancery Bar with a stuff gown. Having thus risen to independence by his industry and talents, he felt aspirations after political distinction, and contested Reading in 1826; and after a severe contest, which is said to have cost him many thousand pounds, he was returned to Parliament. He was, however, unseated on petition. But his wish for a seat in the House of Commons did not remain ungratified. The late Vice-Chancellor of England (Sir L. Shadwell) was one of his many friends, and recommended him to Miss Lawrence, who was the patron of the borough of Ripon; and he was soon returned again to the House of Commons. His great reason for wishing a seat in Parliament was to bring forward his views as to Chancery Reform, which he did repeatedly, we fear, to empty benches. The time had not yet arrived. But greater changes than these were to be then proposed, to which all minor evils were forced to give way. The Reform Bill was proposed, and troubled the conscience of Mr. Spence. He had been returned as a Tory, and sat for a close borough. He became convinced that it was his duty to vote for the Bill; and he informed Miss Lawrence of his intention, resolving that if she objected he would resign his seat. She informed him that he might do as he pleased; and he voted throughout for this measure. He did not, however, retain his seat for Ripon at the next election. His conduct throughout this transaction was highly honourable and disinterested. Soon after this he received a silk gown (1835), to which his great practice fully entitled him; but, like some others, he lived to see that all successful juniors do not equally please as leaders. He did not retain his hold on the large business that he had previously enjoyed; and he began to feel the force of that line quoted by a great poet on the decline of his faculties: —

"Unheeded lags the veteran on the stage."

He showed then strong resolution when he determined to devote himself to a great work on the "Equitable Principles of the Court of Chancery;" which he proposed to make complete, not only as an antiquarian work, but as a manual for the practitioner.

He had previously given to the public his work, — *An Inquiry into the Origin of the Laws and Political Institutions of Modern Europe, particularly to those of England.* Murray, 1826. And we believe that the following work was also by him: — *The Code Napoleon or the French Civil Code, literally translated by a Barrister of the Inner Temple.* Benning, 1827. Besides these, he has published several pamphlets and Addresses on Chancery Reform.

But his great work, by which he will be long known to the profession, is the work we have above alluded to, on the Principles of the Court of Chancery, of which he lived to publish two large volumes; these we have already reviewed at length. He was at work on the third volume at the time of his death. This was a most melancholy one. In a moment of insanity, his over-fraught mind broke down, and he perished by his own hand. "Alas!" says one of the letters before us, "who would have thought that that life would have *thus* been terminated, and he a man so single-minded and amiable, who knew no ill and thought no ill!". All who knew him would confirm the truth and justice of this character of this truly amiable man. We who survive can only trust, as we believe, that he found that pardon which we know he sought. As our readers are aware, he was an active member of the Law Amendment Society, and an ardent Law Reformer. He was also appointed Professor of Equitable Jurisprudence by the Society of Lincoln's Inn, and delivered lectures, but not with great success. In 1819, he married a daughter of Mr. Kelsal, a solicitor in Chester. He has also left two sons.

Some progress has been made in Legal Education within the last quarter. Mr. W. D. Lewis continues to lecture on Real Property (having lately, we believe, confined himself to readings on select cases from Lord Coke), to a well-attended class. There will be a voluntary examination in June. The Middle Temple has done well in appointing Mr. J. G. Phillimore to the lectureship on the Civil Law; and we are informed that his Inaugural Lecture, very recently delivered, was highly successful. Mr. Hall continues his lectures on Common Law at the Inner Temple, and the Benchers have here delivered a prize to the most deserving student. T'

are all praiseworthy doings; but a more extensive movement in favour of Legal Education must be made. It is not possible, after the Commission of Inquiry into the English Universities, to resist an inquiry into the revenues and discipline of the Inns of Court. This will come, and when it does come it will bring with it the effects which accompany all LATE REFORMATIONS to which we have already alluded.

Jan. 29. 1851.

NOTE (A.) TO ART. I.

WE are enabled to lay before our readers the opinions of many of the most eminent members of the Judicial Body of the State of New York, with respect to the working of the Code, and we do not know where we can get evidence on such a subject more trustworthy or valuable. These learned persons could have no prepossession in favour of the change; their labour, indeed, as some of them say in their communications, is increased, their prejudices must all have been in favour of the old system under which they had obtained station, place, and reputation; they must have seen cut off from them for ever a considerable portion of their previous learning; they could no longer indulge in all the subtleties of pleading, or revel in technical distinctions; they were deprived at once of the melancholy pleasure of tripping up a party on a point of form, or catching him in one of the traps or pitfalls which are set so plentifully about our Courts. Abandoning all these curious delights, the Judges of the State of New York have given their opinions on the working of the Code in a careful and a very useful manner, feeling the responsibility of their situation. They have thus afforded a valuable contribution to the science of practical jurisprudence, and have, if it were at all necessary, set a good example to all other Judges, the Judges of our own Superior Courts not excepted. It is to be observed that some of the American Judges opposed the great changes contained in the Code previous to their coming into operation. We shall notice their letters according to their date. They are all addressed to Mr. Dudley Field, and were forwarded by him to this country. We shall only give the most important portions, as they have been given at length in most of the newspapers.

"I regard the uniting of Law and Equity jurisdictions in the same tribunal as one of the most desirable of modern reforms. I think every day that passes will increase our surprise that a separation of Law and Equity was ever tolerated.

"Our present plan of taking testimony in open court at the circuits has many advantages over the late practice of taking proofs in Chancery. I often try at the circuit in a few hours an equity case that would have occupied several days before the examiner, under the old system. When the parties are before the Court, it is easy to ascertain the real point in controversy, and to direct all the evidence to it. Having taken the evidence, and being of course familiar with it, much less time is consumed in the argument of counsel."

"AMASA J. PARKER,
[Judge of the Supreme Court of New York.]

"In the extensive practice which has come under my notice since the amalgamation, I have as yet seen no evils arising from it, nor any inconveniences which would not have occurred under the former system. In short, I have no hesitation in saying that the change has worked well. In the outset efforts were made to obtain equitable remedies in cases to which they were not applicable. But this confusion appears to have been dispelled.

"You will recollect our friendly arguments on the blending of Law and Equity procedure, and that in those, as well as in print, I opposed the abolition of the Court of Chancery. My plan was, to engraft in our Chancery system trial by jury, when required by either party, and the oral examination of witnesses in all cases, whether before a Jury or the Chancellor. I am not prepared to say that in a state where there are separate Courts of Law and Equity, administered by separate Judges, I would recommend a blending of the two. The advantages of a division of judicial business with reference to the subject of litigation, founded on established and intelligible modes of procedure, are not to be slighted, and on our old system there were very few cases in which an error occurred in selecting the proper forum, while there were hundreds which silently testified to the great advantages of the Chancery organisation. I would institute extensive reforms, but I doubt whether I would abolish the Court. This doubt in my mind may be an undue bias, the effect of my long and intimate association with the business of the late Court of Chancery.

"Where there are distinct systems of Law and Equity administered by the same judges, I have no hesitation on the subject. Unless each could be administered by a distinct judge I would amalgamate the forms of procedure at once. Our experience, while our Circuit Judges were Vice-Chancellors, was abundant to show that there should be either an entirely distinct set of judges, or a single and uniform system.

"Lewis H. Sanford,"

[Judge of the Superior Court of New York, and formerly Vice-Chancellor.]

"Albany, Sept. 30. 1850.

"The leading principles upon which the reform embodied in the Code is founded are such as no government, when once adopted, will ever relinquish. There is at this day at least, no reason why the distinction between the Equity and Common Law proceedings should be preserved. Nor is there any more reason for preserving the different forms of actions at Law. The provisions of the Code in this respect abolishing the distinction between Law and Equity, and the different forms of action at Common Law are, with perhaps here and there a single, if not a singular, exception, approved and commended by our entire judiciary and bar. The adoption of the Code was a great step in improvement as well as progress. The great and leading features of the system can never be abandoned. In its details it is yet defective. Some of these defects will be cured by legislation; others by experience. Although I have sometimes felt discouraged, for reasons at which I have already hinted, it is still my purpose to give my best efforts to carrying out and perfecting a system, resting, as I am persuaded this does, upon the only sound basis of legal practice.

"Ira Harris,

[Judge of the Supreme Court of New York.]

The opinions of Judges Mason, Duer, and Campbell, of the Superior Court, and of Judge Ingraham, of the Court of Common Pleas (since received), are at least equally favourable. We shall refer to them hereafter.

Besides these opinions of the Judges of New York, the Law Amendment Society has had the advantage of communicating with two members of the Bar, Mr. John Pruyn of Albany, New York, and Mr. M'Curdy, of Connecticut, in passing through London on his way to Vienna, to which government he has been sent by the United States as *chargé d'affaires*. These gentlemen are both qualified to give an opinion on the subject, and they bear their testimony in favour of the Code. So far, then, we have reason to suppose that this is a beneficial alteration of the law. It behoves us, however, not to be too much influenced by these statements, but to wait for complete evidence, and more especially for the answers made to the Questions printed *antè*, p. 239. n. A case, however, has been made for inquiry, and we are very glad to see that the Law Amendment Society has appointed a committee to inquire (in the words suggested by Mr. Bethell) "whether the principles of Law and Equity can be administered in the same Court and by the same form of procedure; and in making such inquiry the Committee are requested to have regard to the provisions and operation of the New York Code." From this Committee we expect a useful and impartial inquiry. It is composed of gentlemen, not only of the Equity and Common Law Bars, but three merchants have been added to them. The Committee appointed is as follows: — Mr. Commissioner Fane; Mr. M. D. Hill, Q.C.; Mr. Bethell, Q.C.; Mr. Pitt Taylor; Mr. Creasy; Mr. James Stewart; Mr. Robert Lowe; Mr. Vansittart Neale; Mr. Massey; Mr. Trower; Mr. D. Power; Mr. Hawes; Mr. Elliott; and Mr. Alderman Salomons.

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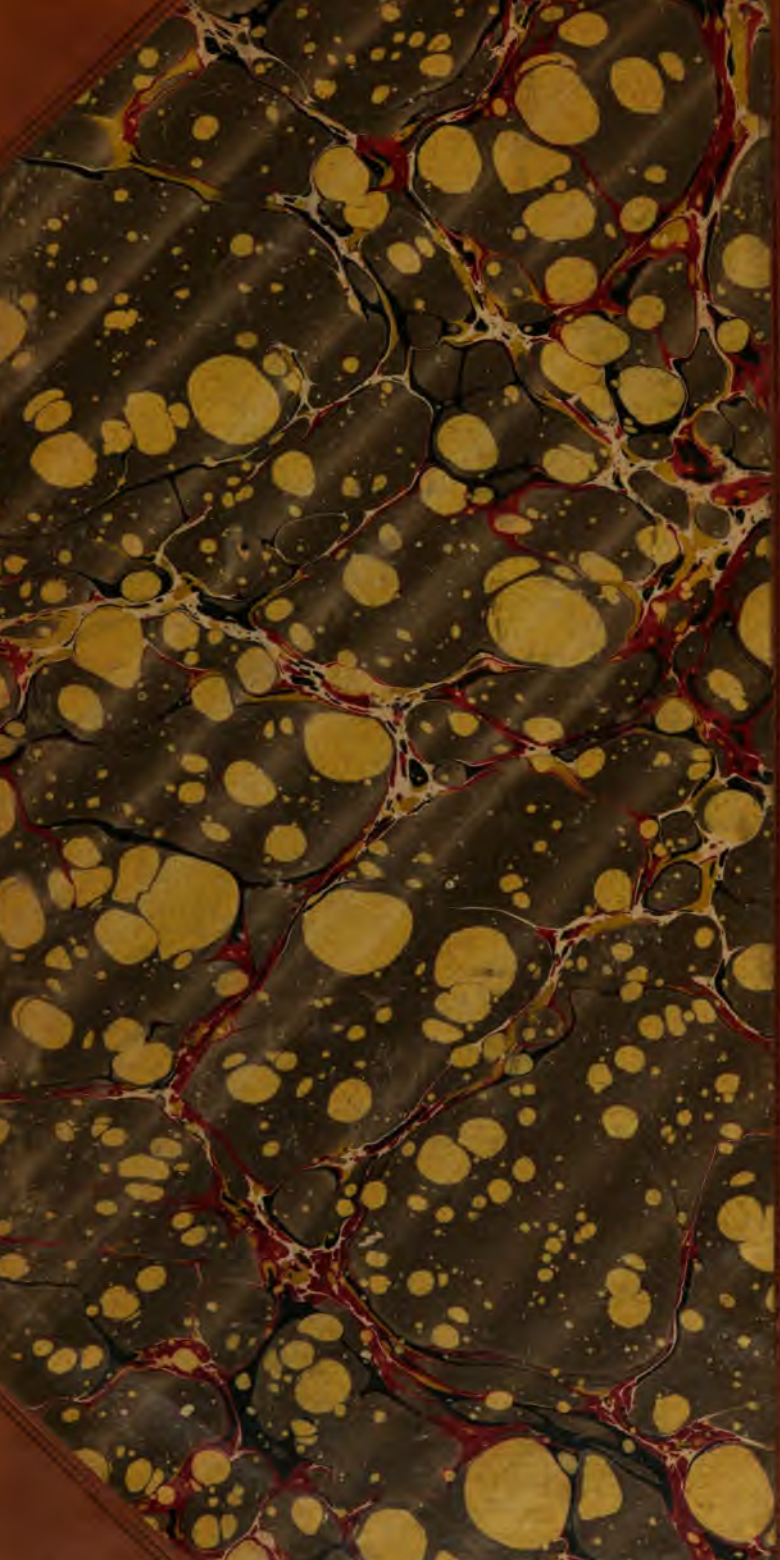
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